Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

91-796

No. 91-___

In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, et al.,

Petitioners,

v.

JOHN WAIHEE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KAREN A. ESSENE
(Counsel of Record)
2133 Alaeloa Place
Honolulu, Hawaii 96821
(808) 732-2192

CARL M. VARADY
American Civil Liberties
Union of Hawaii
Foundation
212 Merchant Street
Suite 303
Honolulu, Hawaii 96813
(808) 545-1722
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the enactment of a state holiday on Good Friday violates the Establishment Clause when the legislature stated that the holiday was justified "in view of the religious significance of Good Friday"?

2. Whether a federal court may "revise" legislative intent by substituting its own statement of purpose for a legislature's express statement of its actual purpose?

3. Whether the state's observance of a legal holiday on a day of exclusively religious significance – the day that commemorates the crucifixion of Jesus Christ – conveys a message of endorsing the Christian faith, in violation of the Establishment Clause?

LIST OF PARTIES

The petitioners in this case are:

NELL A. CAMMACK

GENIE LUCAS

DOUGLAS PAUL ROOT

CAROLYN L. STAPLETON

MICHELE WALLACE

The respondents in this case are:

JOHN WAIHEE, in his capacity as Governor of the State of Hawaii

ALFRED LARDIZABAL, in his capacity as Director of Personnel Services of the State of Hawaii

FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu

JEREMY HARRIS, in his capacity as Managing Director of the City and County of Honolulu

LORETTA K. FUKUDA, in her capacity as Director of Civil Service of the City and County of Honolulu

UNITED PUBLIC WORKERS, LOCAL 646, AFSCME

HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME*

---

*The omission of the Hawaii Government Employees' Association from the list of appellees in the reported opinion at 932 F.2d 765 (9th Cir. 1991) was inadvertent. *See* 673 F. Supp. 1524 (D. Haw. 1987) (complete list of parties).

LIST OF PARTIES – Continued

HAWAII STATE TEACHERS ASSOCIATION

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY

HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

Legislative History 3

Proceedings Below 7

REASONS FOR GRANTING THE WRIT 9

A. Review should be granted to determine whether the Establishment Clause requires an examination of the specific purpose for the enactment as opposed to a broader, general purpose underlying the enactment 9

B. Review should be granted to resolve whether the judiciary is free to "revise" legislative intent 13

C. Review should be granted to resolve whether preferential treatment of the religious beliefs and practices of the dominant faith is now deemed permissible 15

CONCLUSION 19

APPENDICES

A Order and Amended Opinion of the Court of Appeals, August 9, 1991 ..... A-1

B Order of the District Court, November 23, 1987 ..... A-71

TABLE OF CONTENTS – Continued

Page

C Order and Dissents of the Court of Appeals (Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc), August 13, 1991 ..... A-107

D Statutory Provision: Hawaii Revised Statutes § 8-1 ..... A-122

TABLE OF AUTHORITIES

Page

CASES

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 10, 13

Bowen v. Kendrick, 487 U.S. 589 (1988) 9, 10, 12, 13

Cammack v. Waihee, 673 F. Supp. 1524 (D. Haw. 1987), *aff'd*, 932 F.2d 765 (9th Cir. 1991) 2, 7, 14

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) ..... *passim*

County of Allegheny v. ACLU, 492 U.S. 573 (1989) ... 16, 18

Edwards v. Aguillard, 482 U.S. 578 (1987) .. 9, 11, 13, 15

Epperson v. Arkansas, 393 U.S. 97 (1968) ... 9, 10, 12, 13

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 18

Griswold Inn, Inc. v. State, 183 Conn. 552, 441 A.2d 16 (1981) 3, 14, 16

Larson v. Valente, 456 U.S. 228 (1982) 18

Lynch v. Donnelly, 465 U.S. 668 (1984) 11, 18

Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) 14

McGowan v. Maryland, 366 U.S. 420 (1961) 13, 14

Stone v. Graham, 449 U.S. 39 (1981) 11, 13

Wallace v. Jaffree, 472 U.S. 38 (1985) 9, 13, 15, 18

CONSTITUTIONAL PROVISION

U.S. Const. Amend. I 2

TABLE OF AUTHORITIES – Continued

Page

STATUTORY PROVISIONS

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1343(a)(3) 7
42 U.S.C. § 1983 7
Act 132, 1941 Haw. Sess. Laws 6
Act 162, 1963 Haw. Sess. Laws 17
Haw. Rev. Stat. § 8-1 ..... 2, 6
Haw. Rev. Stat. § 8-4 17
Haw. Rev. Stat. § 8-4.5 17

LEGISLATIVE MATERIALS

1929 Haw. S.J. 727 3
1931 Haw. S.J. 802-03 4
1937 Haw. H.J. 2359 4
1939 Haw. H.J. 890 5
1939 Haw. H.J. 899 5
1939 Haw. S.J. 1086 5
1939 Haw. S.J. 1596 5
1941 Haw. H.J. 899 6
1941 Haw. H.J. 919-20 6
1941 Haw. H.J. 1362 6
1941 Haw. H.J. 2509 6
1941 Haw. S.J. 710 6

TABLE OF AUTHORITIES – Continued

Page

1941 Haw. S.J. 765-66 6

1941 Haw. S.J. 1433 6

1963 Haw. H.J. 661 17

1963 Haw. H.J. 843 17

Haw. H. Stand. Comm. Rep. No. 254 (1939), *reprinted in* 1939 Haw. H.J. 890 5

Haw. H. Stand. Comm. Rep. No. 279 (1963), *reprinted in* 1963 Haw. H.J. 661 17

Haw. H.B. 39 (1939) 5

Haw. H.B. 86 (1937) 4

Haw. H.B. 154 (1941) 6

Haw. H.B. 297 (1931) 4

Haw. H.B. 1038 (1963) 17

Haw. S. Stand. Comm. Rep. No. 225 (1929), *reprinted in* 1929 Haw. S.J. 727 3

Haw. S. Stand. Comm. Rep. No. 239 (1931), *reprinted in* 1931 Haw. S.J. 802-03 4

Haw. S. Stand. Comm. Rep. No. 935 (1963), *reprinted in* 1963 Haw. H.J. 843 17

Haw. S.B. 136 (1929) 3

Letter from John A. Hamilton to Governor Joseph B. Poindexter (Apr. 24, 1939) 5

Veto Message from Governor (May 3, 1939) 5

No. 91-___

In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, et al.,

Petitioners,

v.

JOHN WAIHEE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Nell A. Cammack, Genie Lucas, Douglas Paul Root, Carolyn L. Stapleton, and Michele Wallace respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case on August 9, 1991 (amending the opinion of April 30, 1991).

OPINIONS BELOW

The amended opinion of the court of appeals is reported as *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), and is reprinted in Appendix A. The order and

dissents in the denial of the petition for rehearing and suggestion for rehearing en banc are reported at 944 F.2d 466 (9th Cir. 1991) and are reprinted in Appendix C. The opinion of the district court is reported at 673 F. Supp. 1524 (D. Haw. 1987) and is reprinted in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered April 30, 1991. Petitioners filed a timely petition for rehearing and suggestion of rehearing en banc on May 13, 1991; the petition was denied August 13, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Establishment Clause of the First Amendment to the Constitution provides as follows: "Congress shall make no law respecting an establishment of religion . . . . " Appendix D contains the full text of Hawaii Revised Statutes section 8-1 (which codifies Hawaii's annual state holidays, including the Good Friday holiday at issue here).

STATEMENT OF THE CASE

"The holly and the ivy, jingling bells, red-nosed reindeer, and frosty snowmen this is not. What this case *is*

about is Hawaii's endorsement, by means of a state holiday, of a day thoroughly infused with religious significance alone." A50 (emphasis in original). With these words, Judge Nelson in her dissenting opinion below aptly described the central issue in this case, which challenges the Good Friday holiday in Hawaii. The significance of Good Friday was described in *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16, 17 (1981), as follows:

> Good Friday is an annual day of holiness [,] . . . commemorat[ing] the death by crucifixion of Jesus Christ, the founding inspiration of [the Christian] faith, whose death is by [Christians] believed to constitute an act of atonement for human transgressions against [God's] commandments[.]

The religious significance of the Good Friday holy day was not incidental to its enactment as a state holiday in Hawaii. In fact, the twelve-year effort to establish the Good Friday holiday was successful only when the proponents set forth persuasive religious reasons for its enactment. At the same time, the constitutional issue presented by this case is not unique to Hawaii. Twelve other states have also established Good Friday as a public holiday. *See* A11 & n.2 (citing state statutes).

Legislative History

In 1929, the Hawaii Territorial Legislature considered a bill "to have Good Friday declared a legal holiday," but it was rejected for the stated reason that "there are already enough legal holidays[.]"[1] In the 1931 biennial

---

[1] Haw. S. Stand. Comm. Rep. No. 225 (1929), *reprinted in* 1929 Haw. S.J. 727 (tabling S.B. 136); Excerpts of Record (ER) 46.

session, a virtually identical bill was introduced, but it, too, was rejected because "no good reason for adding to the number of Territorial holidays" was seen.[2] Similarly, in the 1937 biennial session, another bill for a Good Friday holiday was introduced and was once again rejected.[3]

In 1939, however, the legislative sentiment in both houses favored the establishment of a legal holiday on Good Friday. The religious basis for the decision was plainly set forth in the statement of legislative purpose:

> There are now ten legal holidays in the Territory, including Thanksgiving, plus primary and general election days. Public sentiment is divided on the advisability of creating Good Friday a legal holiday. Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally strongly that good Friday[,] being in theory at least *a day of solemn religious observance* by the members of the various churches and religious denominations[,] should be given legal sanction. *More and more churches are now conducting the three-hour service on that day* and many business houses are allowing

---

[2] Haw. S. Stand. Comm. Rep. No. 239 (1931), *reprinted in* 1931 Haw. S.J. 802-03 (tabling H.B. 297); ER 47.

[3] *See* 1937 Haw. H.J. 2359 (tabling Haw. H.B. 86, which would have added "[t]he Friday immediately preceding Easter Sunday and known as Good Friday" to the roster of holidays).

> their employees to take time off for this purpose. If the legislature should feel that we should have more legal holidays than we now have, it would seem that *in view of the religious significance of Good Friday* observance of this day would have as much justification as Thanksgiving or Christmas.
>
> The proponents of this Bill are *very sincere* in their reasons for desiring its passage . . . . [4]

(Emphasis added.) The 1939 Good Friday holiday bill passed unanimously in the House (29-0), by a wide margin in the Senate (11-4),[5] and was sent to the governor.

The governor received many objections to the bill,[6] including a letter from an officer of the Chamber of Commerce, pointing out that not all merchants would close on Good Friday and urging that "the present situation, whereby any employee who wishes to participate in Good Friday services is given time off, letting it be optional rather than legal, is the best solution."[7] The governor pocket-vetoed the bill.[8]

---

[4] Haw. H. Stand. Comm. Rep. No. 254 (1939), *reprinted in* 1939 Haw. H.J. 890 (recommending passage of H.B. 39); ER 48-49.

[5] *See* 1939 Haw. H.J. 899 (vote of 29-0); 1939 Haw. S.J. 1086 (vote of 11-4).

[6] *See* Governor's Veto Message (May 3, 1939); ER 60.

[7] Letter from John A. Hamilton to Governor Joseph B. Poindexter (Apr. 24, 1939); ER 59.

[8] *See* 1939 Haw. S.J. 1596; *see also* ER 60. The governor's veto message was delivered after the legislature had adjourned.

In 1941, during the next biennial session, the legislature unanimously passed a bill designating Good Friday as a legal holiday.[9] It became law without the governor's signature,[10] and since that time Good Friday has been observed as a public holiday in Hawaii.[11]

Public expenditures in support of the Good Friday holiday now exceed $4,250,000 per year.[12] In the four years since the instant action was filed, the state and the county governments have spent well over $17,000,000 in

---

[9] *See* 1941 Haw. H.J. 919-20 & 1362 (votes of 26-0 and 30-0 on Haw. H.B. 154); 1941 Haw. S.J. 765-66 (vote of 14-0 on the same bill).

The bill as introduced would have created a legal holiday on Lincoln's Birthday (February 12), but a floor amendment quickly restored the proposed Good Friday holiday that the governor had pocket-vetoed after the previous session. *See* 1941 Haw. H.J. 899, 919. Initially, a few senators thought that a holiday on Lincoln's Birthday was "inadvisable" during the same month as the existing holiday on Washington's Birthday (February 22). *See* 1941 Haw. S.J. 710; ER 52. Their concern was entirely allayed, however, and the bill with the two new holidays passed both houses unanimously.

[10] *See* 1941 Haw. H.J. 2509; 1941 Haw. S.J. 1433; Act 132, 1941 Haw. Sess. Laws.

[11] The holiday is now codified in Haw. Rev. Stat. § 8-1. *See* App. D.

[12] The State of Hawaii admits that it spends $3.4 Million per year on personnel costs to observe the holiday. *See* ER 62. The City and County of Honolulu admits that it spends approximately $350,000 per year for overtime holiday pay and another $500,000 per year for additional personnel costs to observe the holiday. *See* ER 61. The costs for the other counties are not on the record.

public funds to observe the holiday, the establishment of which was justified "in view of [its] religious significance." In addition, the public observance of Good Friday requires that state and all four county governments close down for the day, with public access to state and county facilities and services being denied or severely curtailed.

Proceedings Below

Petitioners Cammack, Lucas, Root, Stapleton, and Wallace[13] (Hawaii residents and taxpayers) filed suit under 42 U.S.C. § 1983 in federal district court against the governor, the mayor, other public officials, and public employee unions (respondents here). A12. Petitioners sought a declaration that the Hawaii statute that designates Good Friday as a legal holiday is unconstitutional as violative of the Establishment Clause of the First Amendment to the United States Constitution and that the public employee collective bargaining agreements are unconstitutional to the extent that they provide for paid leave on Good Friday. A12-A14. The district court's jurisdiction was invoked under 28 U.S.C. § 1343(a)(3).

Holding that the Good Friday holiday does not violate the Establishment Clause, the district court granted summary judgment for respondents. *See* App. B. By a divided vote, the court of appeals affirmed, stating that

---

[13] Lucas, a Roman Catholic, is a lay teacher in a Catholic high school, where she is the chairperson of the theology department. Stapleton is a United Methodist minister and a lawyer. Wallace, also a lawyer, is a Unitarian. Cammack, a nonbeliever, is a transportation planner working for the State of Hawaii. Root is a chemist and has no religious affiliation.

the legislature's secular purpose for establishing the good Friday holiday was to have "another holiday," and stating that, as to the effect of the holiday, the "average" citizen of Hawaii would view Good Friday no differently from Christmas. A34, A38, A48. Judge Nelson, in her dissenting opinion below, found that the religious purpose was clear from the legislature's "perspicuous language [justifying the holiday] 'in view of the religious significance of Good Friday.' " A55 (quoting the 1939 legislature).[14] In addition, the effect of the Good Friday holiday is impermissible, Judge Nelson stated, because by endorsing a Christian holy day remembered for its "religious significance alone," A50, Hawaii conveys a message to nonChristians that their religious beliefs are not worthy of the same honor. A64.

Upon consideration of the petition for rehearing with suggestion of rehearing en banc, the court of appeals denied the petition over three dissenting opinions (written or joined by six circuit judges). *See* App. C. Judge Reinhardt, in his dissent, pointed out that the panel majority had misapplied the secular purpose test: "all essential elements of the statute [must be considered], not just those of secular origin." A114. Applied properly, the test leads to the "inexorable conclusion" that a primary purpose of the Good Friday holiday was "to foster the observance of religion," in violation of the Establishment Clause. *Id.* Judge Reinhardt found the effect of the holiday equally impermissible, because Good Friday, which "marks one of the holiest moments of a particular

---

[14] *See* note 4, *supra*, and accompanying text.

faith," is an "occasion which Hawaii has chosen to consecrate and on which it has placed the official endorsement of the state." A119.

REASONS FOR GRANTING THE WRIT

A. Review should be granted to determine whether the Establishment Clause requires an examination of the specific purpose for the enactment as opposed to a broader, general purpose underlying the enactment.

This Court's Establishment Clause decisions make clear that any inquiry into an act's secular purpose begins by identifying the purpose "that *animated* the adoption of the Act." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (emphasis added); *id.* at 603 (identifying the act's "reason for existence") (Powell, J., concurring); *Bowen v. Kendrick*, 487 U.S. 589, 603-04 (1988) (identifying the specific aims of Congress); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) (identifying "the law's reason for existence"). Justice O'Connor has explained the rationale for this requirement as follows:

> [T]he secular purpose requirement . . . serves an important function. It reminds government that when it acts it should do so *without endorsing a particular religious belief or practice that all citizens do not share.* In this sense, the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985) (O'Connor, J., concurring) (emphasis added).

When the purpose for an enactment is challenged as being religious, the proper inquiry relates *not* to a general purpose underlying the enactment, but to the specific purpose for the enactment itself. Thus, in *Epperson*, for example, the prohibition against teaching the theory of evolution in public schools was not rescued by the general purpose of "specify[ing] the curriculum in [Arkansas] public schools," 393 U.S. at 101 n.7, because the specific purpose was to tailor the curriculum to conform to "a particular religious doctrine [of] a particular religious group," *id.* at 104. Similarly, in *Kendrick*, the general goal identified by Congress for the Adolescent Family Life Act (to address the problems of adolescent sexuality, pregnancy, and parenthood) was not the focus of the secular purpose inquiry; instead, this Court examined the specific purpose (enlisting the aid of religious and charitable organizations, family members, voluntary associations, and other private sector groups in order to increase broad-based community involvement in solving the identified problem) and found that the purpose of the enactment was essentially secular. 487 U.S. at 603. In *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963), the public school practice of reading Bible verses and reciting a prayer in unison each morning could not be validated by reference to general public goals such as "promotion of moral values," when the practice in question was plainly a religious exercise.

The recitation of broad, general purposes, as in the cases cited above, or the recitation of purportedly secular

purposes[15] or ancillary secular objectives[16] is immaterial to the secular purpose analysis, which examines the specific purpose that animated the act in question. As Judge Reinhardt pointed out in his dissent from the order denying en banc review in this case, "*every* statute [could] be described in such a way that it includes a secular purpose." A113 (emphasis in original). Given these principles, this Court has not been deterred from striking down laws enacted for a "preeminent religious purpose." *Edwards*, 482 U.S. at 590.

In the instant case, the Hawaii legislature was perfectly candid about its religious purpose for enacting the Good Friday holiday. The legislative history shows that, from 1929 to 1937, the prevailing view in the legislature was that Hawaii already had a sufficient number of holidays and that no good reason had been offered for adding Good Friday to the list. In 1939, the proponents of

---

[15] *See Edwards*, 482 U.S. at 586 (rejecting legislature's stated purpose to "protect academic freedom" when purpose of creationism act was to forbid the teaching of the theory of evolution in public schools except in conjunction with teaching a religious doctrine); *Stone v. Graham*, 449 U.S. 39, 41 (1981) (rejecting "legislative recitation of a supposed secular purpose" for posting the text of the Ten Commandments in public school classrooms).

[16] *See Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (noting that a statute enacted with a preeminent religious purpose is not saved by the mere existence of "some secular objectives") (O'Connor, J., concurring).

the bill acknowledged that there was some public sentiment opposing any more holidays but stated that, as a day of "solemn religious observance by the members of the various churches and religious denominations," Good Friday "should be given legal sanction."[17] Public observance of the holiday was said to be justified "in view of the religious significance of Good Friday," and the proponents declared themselves "very sincere" in their reasons for pressing for the Good Friday holiday bill.[18] With these words, the proponents of the bill won near unanimous support for the legislation in 1939 and achieved its enactment in 1941. As Judge Nelson said in her dissenting opinion below, the religious purpose that animated the establishment of the Good Friday holiday could not be more perspicuous. A55.

The majority below decided that having "another holiday" was the relevant purpose and that that purpose was "primary" or at least constituted "*a* legitimate, sincere secular purpose." A38, A34 (emphasis in original).[19] Then, having cited *Bowen v. Kendrick*, 487 U.S. 589 (1988), for the proposition that the purpose of a statute is impermissible only if the purpose is "wholly" or "entirely" religious, A29, the majority below concluded that the secular purpose requirement was satisfied.

---

[17] *See supra* note 4 and accompanying text.

[18] *Id.*

[19] The analogy to *Epperson* is striking: there the Arkansas Supreme Court had decided that the law banning the teaching of evolution from the public school curriculum served the secular purpose of setting the curriculum, *see* 393 U.S. at 101 n.7, but this Court rejected that characterization.

This Court's secular purpose analysis in *Kendrick* identified and analyzed the animating purpose of the enactment in question, not broad, general purposes or ancillary objectives. The court of appeals below, however, not only failed to follow the analytical approach in *Kendrick* but disregarded this Court's earlier precedents such as *Edwards, Wallace, Stone, Epperson,* and *Schempp.* For this reason, petitioners submit that the fundamental misunderstanding of the Establishment Clause evident in the decision below demonstrates the need for plenary review by this Court.

B. Review should be granted to resolve whether the judiciary is free to "revise" legislative intent.

Despite finding no "religious motivation" for the Good Friday holiday enactment, A32, the majority below did acknowledge that "an improper purpose" might be "gleaned" from the legislative history. A34. To remedy that problem, the court of appeals substituted its own versions of legislative intent for the legislature's actual intent, as follows: the court said that the purpose of the 1941 enactment is to be found in the present-day "concerns of organized labor," A34-A35 (citing *McGowan v. Maryland,* 366 U.S. 420 (1961); that the purpose was "the majority's political accommodation of its own religious practices,"[20] A35 &

---

[20] In fact, employees were already being accommodated by being given time off if they "wish[ed] to participate in Good Friday services" (*see supra* note 7 and accompanying text). Accommodation was plainly not the legislature's purpose.

n.15; and that the purpose was to establish "a uniform day of rest," A34, A44 (alluding to *McGowan*).

In *McGowan*, this Court upheld Maryland's Sunday closing laws, after noting the "special significance [of Sunday] as a rest day," a day of "family activity," and a day of secular import for "*[p]eople of all religions and people with no religion*[.]" 366 U.S. at 451-52 (emphasis added). In contrast, Good Friday has acquired no secular traditions and remains an exclusively religious day.[21] It is a day of holy obligation for practicing Christians, but for "adherents of other religions or nonreligious persons" it is a day they "could not imagine honoring." A70 (Nelson, J., dissenting).

Moreover, in *McGowan*, it was the legislature, not the Court, that stated its purpose to ensure a "common day of rest" for all members of the family and community. Here, however, the court of appeals borrowed the Maryland legislature's secular purpose for the 1956 Sunday

---

[21] The district court below said that Good Friday has "attained a partially secular character[.]" A103. Its explanation was that for Christians, Good Friday is a holy day, but for "Jews, Buddhists, Baha'is, and atheists," it is a day for "hunting for gaily colored eggs [and] delivering baskets of candies and flowers to family and friends [.]" A98. Disavowing that notion, the court of appeals stated that it did not accept the contention that Good Friday has become secularized. A49 n.19. Other than the district court below, no court has found any secularization of Good Friday. *See Mandel v. Hodges*, 54 Cal. App. 3d 596, 612, 127 Cal. Rptr. 244, 254 (1976) (no evidence of secularization "in any degree"); *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16, 21 (1981) (clearly lacks "acceptance as a secular holiday").

closing laws and substituted it for the Hawaii legislature's express, preeminent religious purpose for the 1941 Good Friday holiday law. Petitioners would ask this Court to decide whether the courts are free to discard legislative intent and substitute their own statement for the legislature's statement of purpose.[22]

C. Review should be granted to resolve whether preferential treatment of the religious beliefs and practices of the dominant faith is now deemed permissible.

"In selecting particular state holidays, the polity does more than honor the past; it identifies the people, events, and values from which it draws inspiration and seeks guidance." A65 (Nelson, J., dissenting). The legislature's selection of holidays is viewed by the public as a collective expression of the community's wish to accord special approval of particular events and persons. As Judge Nelson pointed out, the "fierce debates over the celebration of Martin Luther King Day attest to our own extreme sensitivity to this issue." *Id.* "By honoring a given day, the state *endorses* an event as a fair reflection of its beliefs; it *establishes* that event as a privileged repository of its values." *Id.* (emphasis in original). The symbolic significance of such action is not only intentional, but inescapable.

---

[22] This is not to say that courts should accept a "sham secular purpose" or a purpose statement that is not "sincere." *See Wallace*, 472 U.S. at 75 (O'Connor, J., concurring); *Edwards*, 487 U.S. at 604. Here, nothing would suggest that the expressed intent of the Hawaii legislature was insincere or was a sham.

It is widely recognized that, unlike Good Friday, the observance of Christmas encompasses secular and religious celebration and that many people of many religions (or no religion) join in its secular celebration. For that reason, "government's own celebration of Christmas" is permissible as to "the holiday's secular aspects," but government may not affiliate itself with the religious message of Christmas as a holy day. *County of Allegheny v. ACLU*, 492 U.S. 573, 611 (1989). Government's "respect for religious pluralism, a respect commanded by the Constitution," *id.* at 610, is thus compatible with the public observance of Christmas as a holiday. By observing Good Friday as a public holiday, however, the State of Hawaii commemorates the holiest day of the Western Christian calendar,[23] a day with no secular message, a day that represents a central message of the Christian faith. The state's commemoration is not, and cannot be, shared by those who, *because of their religion*, do not believe in the central tenet of the Christian faith and, therefore, cannot accord special honor to Good Friday.

The court of appeals stated that Hawaii's holidays "are all selected for their importance to the citizens of Hawaii" but nonetheless held that the holiday observance of Good Friday is "a mere 'acknowledgment' of religion," not an endorsement. A44. In fact, however, the Hawaii

---

[23] The Eastern Christian churches use a different ecclesiastical calendar for determining the dates of Easter and Good Friday, which in most years do not coincide with the dates as calculated by the Western Christian churches. *Griswold Inn*, 441 A.2d at 18.

legislature has distinguished days that are merely worthy of "acknowledgment" from those that are truly worthy of holiday recognition and concomitant public observance at considerable public expense. In 1963, when the legislature had considered a bill introduced "to honor the birthday of Gautama Buddha by establishing April 8 as a State holiday,"[24] the legislature soon amended the bill to delete the proposed holiday status,[25] and then recommended Buddha Day as worthy of public acknowledgment in recognition of its "tremendous" importance[26] to the "thousands of people in the State of Hawaii" who celebrate Buddha Day each year.[27] Now the acknowledgment of Buddha Day lies in a dusty statute where it remains little noticed.[28] In contrast, the public is reminded each year of the preferential place given to Good Friday, which commemorates the crucifixion of Jesus Christ, the religious event that is central to the Christian faith itself.

Endorsement is "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that

---

[24] Haw. H. Stand. Comm. Rep. No. 279 (1963), *reprinted in* 1963 Haw. H.J. 661 (recommending passage of H.B. 1038).

[25] Haw. S. Stand. Comm. Rep. No. 935 (1963), *reprinted in* 1963 Haw. H.J. 843 (recommending passage of H.B. 1038 as amended).

[26] *Id.*

[27] Act 162, 1963 Haw. Sess. Laws (codified as Haw. Rev. Stat. § 8-4. *See ER 44, 56.*

[28] *See* Haw. Rev. Stat. § 8-4. Similarly, one of the holy days of the Baha'i faith is noted in Haw. Rev. Stat. § 8-4.5.

they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. at 689 (O'Connor, J., concurring). Here, an objective observer "acquainted with the text, legislative history, and implementation of the statute," *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring), would receive a message of endorsement because of the legislative history of the holiday and the millions of taxpayer dollars expended each year to implement the holiday, coupled with the annual cessation of public business, in order for the state to accord a special place of honor to a Christian holy day of atonement, a day without any form of secular celebration that other members of the community might share.

This Court recognizes "the bedrock Establishment Clause principle that, regardless of [the earlier] history [of our nation], government may not demonstrate a preference for a particular faith. . . . " *County of Allegheny*, 492 U.S. at 605. " 'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.' " *Id.* (quoting *Larson v. Valente*, 456 U.S. 228 (1982); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 & n.9 (1985) (preferential treatment for sabbath observers held impermissible). One of the questions put to this Court is whether the court of appeals was correct in holding that the state's clear demonstration of its preference for the beliefs and practices of the Christian faith is now deemed permissible.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KAREN A. ESSENE
(Counsel of Record)
2133 Alaeloa Place
Honolulu, Hawaii 96821
(808) 732-2192

CARL M. VARADY
American Civil Liberties
Union of Hawaii
Foundation
212 Merchant Street, Suite 303
Honolulu, Hawaii 96813
(808) 545-1722
Counsel for Petitioners

Dated: November 12, 1991

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NELL A. CAMMACK; GENIE LUCAS; DOUGLAS PAUL ROOT; CAROLYN L. STAPLETON; MICHELE WALLACE,

Plaintiffs-Appellants,

v.

JOHN W [SIC]. WAIHEE, in his capacity as Governor of the State of Hawaii; ALFRED LARDIZABAL, in his capacity as Director of Personnel Services of the State of Hawaii; FRANK F. FASI, in his capacity as Mayor of the City & County of Honolulu; JEREMY HARRIS, in his capacity as Managing Director of the City & County of Honolulu; LORETTA K. FUKUDA, in her capacity as the Director of Civil Service of the City & County of Honolulu; UNITED PUBLIC WORKERS, LOCAL 646, AFSCME; [HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME;] HAWAII STATE TEACHERS ASSOCIATION; UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBY [SIC]; HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF; STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS,

Defendants-Appellees.

No. 87-15073

D.C. No. CV-87-0260-ACK

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
November 14, 1988 – Honolulu,

Filed April 30, 1991
Amended August 9, 1991

Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain and Stephen S. Trott, Circuit Judges.

Opinion by Judge O'Scannlain;
Dissent by Judge D. W. Nelson

SUMMARY

Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that a Hawaii statute declaring Good Friday a state holiday was constitutional.

Since 1941, the State of Hawaii has, by legislative declaration, observed Good Friday as a state holiday. By providing a state holiday, the statute in question has the fiscal impact that many state and local government offices are closed, and many state and local government employees do not report to work. Hawaii's public collective bargaining law mandates that the terms and conditions of public employment be determined through a collective bargaining process. The number and dates of paid leave days are among the mandatory subjects of collective bargaining. Good Friday is included as one such paid leave day. Appellants Nell A. Cammack and others, taxpayers and residents of the state, challenged

the statute in question alleging that setting apart Good Friday as a state holiday violated both the establishment clause of the first amendment of the federal constitution and the state constitution. Appellants also sought a declaration that the state and city collective bargaining agreements were unconstitutional because they provided for paid leave on Good Friday. The district court granted summary judgment in favor of the government.

[1] Initially, the court considered whether appellants, as state and municipal taxpayers, had properly alleged an injury sufficient to endow them with taxpayer standing to challenge the Good Friday public holiday. This required an examination of the injury requirements that pertain to each relevant form of taxpayer standing – state and municipal. [2] The direct injury required by *Doremus* is established when the taxpayer brings a "good-faith pocketbook action;" that is, when the challenged statute involves the expenditure of state tax revenues. [3] While the Ninth Circuit has not previously ruled on the different injury requirements, if any, for municipal taxpayer standing, the court concluded that municipal taxpayer standing simply required the "injury" of an allegedly improper expenditure of municipal funds, and in this way mirrored the court's threshold for state taxpayer standing. [4] Here, appellants' had standing because they set forth their status as state and municipal taxpayers and specifically stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the Good Friday holiday. [5] The court rejected the government's argument that taxpayers as such cannot have standing to challenge the statute in question because the bare declaration of Good Friday as a state

holiday does not, standing alone, involve any expenditure of tax revenues. Legislative enactments are not the only government activity that the taxpayer may have standing to challenge. The taxpayers' allegations identified an expenditure of public funds sufficiently related to appellants' constitutional claim. They also established causation and redressability.

[6] The court noted that the Supreme Court has recently stated that the Establishment Clause means that government may not promote or affiliate itself with any religious doctrine or organization. However, that clause permits government some latitude in recognizing and accommodating the central role religion plays in this society. [7] As such, the court rejected the government's contention that *Marsh* controlled the disposition of this case. Although Hawaii's recognition of Good Friday stems back to its days as a territory, nonetheless it could not be said that it was deeply embedded in the fabric of the state as was legislative prayer in *Marsh*.

[8] The challenged statute had to satisfy all three prongs of the *Lemon* test to comport with the establishment clause. [9] The purpose prong is clearly violated when there is no legitimate secular purpose for the legislation. [10] A statute will fail this prong only if it is motivated wholly by an impermissible purpose. [11] However, in reviewing a challenged statute for a secular purpose, the court is reluctant to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute. [12] An examination of the legislative history surrounding Hawaii's Good Friday law

demonstrated that the primary concern motivating selection of the holiday was simply timing and that the legislature's consideration of earlier attempts to have Good Friday declared a public holiday were devoid of sectarian influences. [13] The court agreed with the district court's conclusion that the primary purpose of the law was to have more legal holidays.

[14] The most ardent proponents of the statute in this litigation were the labor unions who had incorporated the statutory holidays into their collective bargaining agreements with the state and local governments. This was a strong indicant that the purpose animating the challenged act was not so much state sponsorship of religion as state sensitivity to the concerns of organized labor.

[15] The court did not think it was constitutionally significant that Hawaii selected a day of traditional Christian worship, rather a neutral date, for its spring holiday once it identified the need. [16] The court concluded there was nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons. That the state legislature was able to accomplish its secular purpose and at the same time accommodate the widespread religious practices of its citizenry was hardly a reason to invalidate the statute under the purpose prong of the *Lemon* test.

[17] The court next considered whether the Good Friday holiday violated the second prong of the *Lemon* test. This required examining whether the primary effect of the statute was the advancement of religion. [18] Given

that the evidence in this case indicated that large numbers of Hawaiians observe Good Friday, the legislature could not be faulted for not selecting a different spring day for a common day of rest. That the special status of Good Friday derives from its religious origin was no more relevant than Sunday's status as the sabbath for the dominant Christian sects. [19] Evidence that Hawaiians used this day for shopping and pleasure outings indicated that Hawaii's Good Friday holiday, at least at this late day, fifty years after enactment, could not be regarded as an endorsement of religion any more than Sunday closing laws could. [20] The breadth of impact of Hawaii's statute, on its face and by its incorporation into the collective bargaining agreements, contributed to the conclusion that the statute's effect was simply the creation of a paid leave day for all state employees covered by the collective bargaining agreements, regardless of individual beliefs. The paid leave was for the entire day and not only for the three hours associated with the traditional Christian observance of Good Friday.

[21] Good Friday's mere placement on the roll of public holidays, along with other important days of secular and religious significance, diminished the likelihood of an "endorsing" effect. The government's action might best be termed a mere "acknowledgment" of religion. Closing state offices on that day simply acknowledged Good Friday's status as a holiday observed widely enough that the secular purpose of establishing a uniform day of rest was appropriately achieved by selecting it. [22] The context of the Good Friday holiday, a minimal accommodation of the religious practices of some Hawaiians, decreased the likelihood of a public perception of

endorsement. Consequently, the statute satisfied the effect prong of the *Lemon* test.

[23] The third prong of the *Lemon* test required examination of whether the Hawaii statute led to an excessive entanglement with religion. [24] In the case of Hawaii's Good Friday holiday, to the extent that the actual date of the holiday would be determined by resort to church calendars, any such entanglement would surely not be the kind of comprehensive and enduring entanglement the first amendment prohibits. [25] In addition, although political divisiveness has been considered in establishment clause cases, it has never been relied on as an independent ground for holding a government practice unconstitutional. Thus, the Hawaii statute satisfied the entanglement prong of the *Lemon* test.

[26] The Hawaii law did not require or endorse any religious activity, and the only public expenditure associated with the holiday was the continued pay accrued by public employees. The court was persuaded that nothing more was "established" by the statute than an extra day of rest for a weary public labor-force.

Dissenting, Judge Nelson stated that the holly and the ivy, jingling bells, red-nosed reindeer, and frosty snowmen this case was not. What this case was about was Hawaii's endorsement, by means of a state holiday, of a day thoroughly infused with religious significance alone. Because Judge Nelson believed that such a state establishment of religion violated both the purpose and effects prongs of *Lemon*, she strongly dissented.

COUNSEL

Kirk Cashmere and Karen A. Essene, American Civil Liberties Union, Honolulu, Hawaii, for plaintiffs-appellants.

Steven S. Michaels, Deputy Attorney General, Honolulu, Hawaii, for defendant-appellee, State of Hawaii.

Danny J. Vasconcellos, Honolulu, Hawaii, for defendant-appellee United Public Workers, Local 646, AFSCME and Hawaii Government Employees' Association, Local 152, AFSCME.

Vernon Yu and T. Anthony Gill, Gill, Park, Park & Kim, Honolulu, Hawaii, for defendant-appellee Hawaii State Teachers Association and University of Hawaii Professional Assembly.

ORDER

The opinion filed April 30, 1991, slip op. 5347, is amended as follows:

1. On page 5354 of the slip opinion, replace the word "eleven" on line 2 with "twelve" and insert "North Carolina," after "Mexico," on line 4.

2. On page 5354 of the slip opinion, insert "N.C. Gen. Stat. § 103-4(a)(8) (Supp. 1990);" before "N.D. Cent. Code" on line 8 of footnote 2 (the last line of the page).

3. On page 5355 of the slip opinion, delete "*See also* N.C. Gen. Stat. § 103-4(a)(8) (recognizing Easter Monday

as a North Carolina state holiday)." from lines 9-11 of footnote 2 (lines 1-3 on page 5355).

4. On page 5371 of the slip opinion, delete the word "originally" from lines 9-10 of the text on the page.

5. On page 5371 of the slip opinion, delete "why the legislature ultimately opted only for Good Friday" from lines 12-13 of the text on the page, and replace with the following: "that the committee was most interested in the timing of the proposed new holidays".

6. On page 5371 of the slip opinion, after "1941 Haw. Sen. J. 710," on line 22 of the text on the page, insert the following sentences: "Nothing in the legislative history concerning the 1941 bill suggests a religious motivation for its ultimate passage. Indeed, the legislature's approval of both proposed holidays and the governor's expressed opposition, because "the holidays were getting a bit thick about that time of year," betray no particular interest in the secular or sectarian origins of either day."

The pending petition for rehearing and suggestion for rehearing en banc will be addressed in a separate order.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide the constitutionality of a Hawaii statute declaring Good Friday a state holiday. Our task is not as simple as it might appear.

I

In 1941, the Territory of Hawaii enacted a bill declaring that Good Friday, the Friday preceding Easter Sunday, shall be "set apart and established as [a] territorial holiday[ ]." Act effective Apr. 30, 1941, No. A-1 [sic], § 1, 1941 Haw. Sess. Laws 1. Upon statehood, the legislation was ratified and now appears as part of Hawaii Revised Statutes section 8-1, which designates Hawaii state holidays.[1]

---

[1] Section 8-1 in its entirety provides as follows:

§ 8-1 Holidays designated. The following days of each year are set apart and established as state holidays:

The first day in January, New Year's Day;

The third Monday in January, Dr. Martin Luther King, Jr., Day;

The third Monday in February, Presidents' Day;

The twenty-sixth day in March, Prince Jonah Kuhio Kalanianaole Day;

The Friday preceding Easter Sunday, Good Friday;

The last Monday in May, Memorial Day;

The eleventh day in June, King Kamehameha I Day;

The fourth day in July, Independence Day;

The third Friday in August, Admission Day;

The first Monday in September, Labor Day;

The eleventh day in November, Veterans' Day;

(Continued on following page)

Good Friday has thus been a public holiday in Hawaii for fifty years. Good Friday is also a public holiday in twelve other states: Delaware, Florida, Georgia, Indiana, Louisiana, Maryland, New Jersey, New Mexico, North Carolina, North Dakota, Tennessee, and Wisconsin.[2]

Hawaii's section 8-1 appropriates no funds to carry out its purposes. By providing for state holidays, however, the statute has at least the fiscal impact that many

---

(Continued from previous page)

> The fourth Thursday in November, Thanksgiving Day;
>
> The twenty-fifth day in December, Christmas Day;
>
> All election days, except primary and special election days, in the county wherein the election is held;
>
> Any day designated by proclamation by the President of the United States or by the governor as a holiday.

Haw. Rev. Stat. § 8-1 (Supp. 1989).

[2] *See Public Serv. Co. v. Catron*, 98 N.M. 134, 135, 646 P.2d 561, 562 (1982) (construing N.M. R. App. P. 23(a) (Civ.)); Del. Code Ann. tit. 1, § 501 (Supp. 1988); Fla. Stat. Ann. § 683.01(1)(h) (West 1990); Ga. Code Ann. § 1-4-1(a) (authorizing Governor to declare April 26 a state holiday or substitute in another traditional day of worship); Ind. Code § 1-1-9-1(a) (Supp. 1990); La. Rev. Stat. Ann. § 1:55 E.1(a) (West Supp. 1990); Md. Ann. Code art. 1, § 27(a)(6) (Supp. 1990); N.J. Stat. Ann. § 36:1-1 (West Supp. 1990); N.C. Gen. Stat. § 103-4(a)(8) (Supp. 1990); N.D. Cent. Code § 1-03-01(4) (1975); Tenn. Code Ann. § 15-1-101 (1987); Wis. Stat. Ann. § 895.20 (West Supp. 1989). The New York Stock Exchange also adjourns for Good Friday. *See* 50 Fed. Reg. 41,283 n.3 (1985) (noting proposal to open on Good Friday).

state and local government offices are closed and many state and local government employees need not report to work. Furthermore, in 1970, the Hawaii Legislature enacted a public collective bargaining law which mandated that the terms and conditions of public employment be determined through a collective bargaining process. The statute recognized that "joint decision-making [between public employees and their employers] is the modern way of administering government." *Id.* § 89-1. The number and dates of paid leave days are among the mandatory subjects of collective bargaining. All collective bargaining agreements currently in effect between public employees and their employers provide for numerous paid leave days, either expressly or through incorporation of section 8-1. Good Friday is included as one such paid leave day. These collective bargaining agreements cover approximately sixty-five percent of Hawaii's public employees.

II

Nell A. Cammack, Genie Lucas, Douglas Paul Root, Carolyn L. Stapleton, and Michele Wallace, Hawaii taxpayers and residents, filed suit under 42 U.S.C. § 1983 in federal district court against the Governor of the State of Hawaii, the Mayor of the City and County of Honolulu, other officials, and public employee organizations (collectively called "government"), seeking declaratory relief and attorney fees.[3] They allege that the Hawaii statute

---

[3] Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment

(Continued on following page)

setting apart Good Friday as a state holiday violates both the establishment clause of the first amendment of the United States Constitution and article 1, section 4 of the Hawaii State Constitution.[4] Appellants also seek a

---

(Continued from previous page)

clause challenge under section 1983. We note that this route has been traveled before without exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785 (1983) (simply noting that establishment clause challenge was brought under section 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573 (1989). Presumably, a successful challenge here would result in an award of attorney fees. *See* 42 U.S.C. § 1988 (1988).

[4] It appears that the protections afforded by both are co-extensive. *See Koolau Baptist Church v. Department of Labor*, 68 Haw. 410, 718 P.2d 267 (1986) (applying first amendment establishment clause *Lemon* test to claim brought under state and federal constitutions); Op. Haw. Att'y Gen. No. 85-25 (Nov. 15, 1985) (analyzing validity of state license of church-sponsored day care programs under the *Lemon* test). *Compare* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion") *with* Haw. Const. art. I, § 4 ("No law shall be enacted respecting an establishment of religion"). In general, Hawaiian courts resolving cases involving religious freedoms look to first amendment principles and authorities. *See, e.g., Dedman v. Board of Land & Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988); *State v. Andrews*, 65 Haw. 289, 651 P.2d 473 (1982); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *State v. Blake*, 5 Haw. App. 411, 695 P.2d 336 (1985). The state's high court also relies upon first amendment jurisprudence to resolve free speech claims brought under the state constitution. *See, e.g., State v. Hawkins*, 64 Haw. 499, 643 P.2d 1058 (commercial speech), *cert. denied*, 459 U.S. 824 (1982); *State v. Bloss*, 64 Haw. 148, 637 P.2d 1117 (1981) (same), *cert. denied*, 459 U.S. 824 (1982); *State v.*

(Continued on following page)

declaration that the state and city collective bargaining agreements are unconstitutional to the extent that they provide for paid leave on Good Friday.

The district court granted summary judgment in favor of the government, determining that the appellants had standing to bring the action but upholding section 8-1 and the collective bargaining agreements as constitutional. *See Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987). This appeal followed.

III

The government contends that this court lacks jurisdiction because appellants' notice of appeal is defective and because appellants do not have standing. We examine each argument in turn.[5]

(Continued from previous page)

Bumanglag, 63 Haw. 596, 634 P.2d 80 (1981) (pornography); *State v. Manzo*, 58 Haw. 440, 573 P.2d 945 (1977) (same); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975) (defamation).

[5] The government also argues that the district court improperly declined to abstain from deciding this case. Abstention in some instances may be appropriate. *See Burdick v. Takushi*, 846 F.2d 587, 588 (9th Cir. 1988) (abstention is warranted when proper resolution of the state law question at issue is uncertain; a definitive ruling on the state issue potentially obviates the need for constitutional adjudication by the federal courts; the complaint touches upon a sensitive area of social policy). However, abstention from exercising federal

(Continued on following page)

A

Appellants' notice of appeal reads, in pertinent part: "Notice is hereby given that Plaintiffs above-named hereby appeal . . . the final judgment . . . " Notice of Appeal, *Cammack v. Waihee*, Civil No. 87-0260 (D. Haw. Dec. 4, 1987). The compound adjective "above-named" apparently refers to the notice's caption, which states: "Nell A. Cammack, et al., Plaintiffs, vs. John Waihee, et al., Defendants." *Id.*

Federal Rule of Appellate Procedure 3(c) provides that a notice of appeal "shall specify the party or parties taking the appeal." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Supreme Court held that courts "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown.' " *Id.* at 317. In that case, Torres, one of sixteen plaintiffs, had inadvertently been omitted from the list of appellants in the notice of appeal. *Id.* at 313; *see id.* at 323 (Brennan, J., dissenting) (noting that the other fifteen plaintiffs were listed by name as appellants). The Court concluded that Torres had not satisfied the jurisdictional requirements for maintaining

---

(Continued from previous page)

jurisdiction is the exception. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.") (quotation omitted). Here, there appears to be no likelihood of a different result under the state constitution's establishment clause. *See supra* note 4; *see also Cammack*, 673 F. Supp. at 1528-29 (finding no likelihood of a different result).

an appeal, because "he was never named or otherwise designated, however inartfully, in the notice of appeal." *Id.* at 317. The use of the term "et al." in the notice of appeal was insufficient to indicate Torres' intent to appeal, because such a vague designation would not put the appellee or court on notice that Torres was indeed an appellant. *See id.* at 317-18.

In a recent case tracking more closely the facts of the controversy before us, this court ruled that a bare reference to "defendants" in the body of the notice, coupled with use of "et al." in the caption, constituted sufficient notice that all defendants sought appeal of the district court's judgment.[6] *See National Center for Immigrants' Rights, Inc. v. INS*, 892 F.2d 814 (9th Cir. 1989) (per curiam). Where no names were listed in the body of the notice, we held, the intention to include all of the group of "defendatns" in the appeal was clear. *See id.* at 816-17. If only some of the defendants had intended to appeal, the body of the notice would likely have indicated that "certain defendants" were appealing, or would have listed the specific appellants. *Id.* at 817; *see also Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir. 1989) (use of "et al." in caption and indication that "the defendants" were appealing in the body of the notice sufficient to give notice that all defendants were appealing), *overruled, Minority Employees v. Tennessee Dep't of Employment Security*, 901 F.2d 1327 (6th Cir. 1990) (en banc).

---

[6] There is no distinction between "defendants" or "plaintiffs" for the purposes of becoming "appellants" before this court.

As in *National Center for Immigrants' Rights, Inc.*, the notice of appeal in this case is sufficiently clear to alert the court and defendants that all plaintiffs are seeking to appeal. There is no Rule 3(c) jurisdictional bar to this appeal, and we decline the government's invitation to dismiss the appeal.[7]

B

A more difficult question is whether the appellants have standing to maintain this action in federal court. The original complaint alleges each plaintiff to be a citizen of the State of Hawaii, a resident of the City and County of Honolulu, and a taxpayer to each of these entities. Complaint 2-3, *Cammack v. Waihee*, Civil No. 87-0260 (D. Haw. April 6, 1987). The complaint's allegations include the assertion that $3.4 million in state tax revenues and $850,000 in city tax revenues are expended on the holiday. *See id.* at 7.

The district court held that the plaintiffs had state taxpayer standing to challenge the Hawaii statute in federal court. *See Cammack*, 673 F. Supp. at 1527-28. The government argues that the district court erred. The district court did not reach the question of municipal taxpayer standing, but the issue is squarely presented on this record. We consider whether the plaintiffs below (and appellants here) have either state or municipal taxpayer standing to pursue this action in federal court.

---

[7] Even if we were to read the notice of appeal more narrowly, the designation of "Nell A. Cammack" in the caption would be sufficient to preserve her appeal. *See National Center for Immigrants' Rights, Inc.*, 892 F.2d at 816 n.2.

1

[1] THe bedrock requirement for standing is that the challenger suffer "injury." We first consider whether appellants, as state and municipal taxpayers, have properly alleged an injury sufficient to endow them with taxpayer standing to challenge the Good Friday public holiday. This requires an examination of the injury requirements which pertain to each relevant form of taxpayer standing – state and municipal.

[2] The seminal state taxpayer standing case is *Doremus v. Board of Education*, 342 U.S. 429 (1952). In that case, the Supreme Court explained that a state taxpayer has standing to challenge a state statute when the taxpayer is able to show that he " 'has sustained or is immediately in danger of sustaining some direct injury as the result of [the challenged statute's] enforcement.' " *Id.* at 434 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (also known as *Frothingham v. Mellon*)). *The direct injury required by Doremus* is established when the taxpayer brings a "good faith pocketbook action", that is, when the challenged statute involves the expenditure of state tax revenues. *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1178 (9th Cir. 1984) (pleadings must "set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity") (citing *Doremus*); *see also Reimers v. State of Oregon*, 863 F.2d 630, 632 n.4 (9th Cir. 1988) (no state taxpayer standing where taxpayer does not challenge the disbursement of state funds) (citing *Doremus*). However, *Hoohuli*, the leading case on this issue in the circuit, does not require that the taxpayer prove that her

tax burden will be lightened by elimination of the questioned expenditure. *See Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (following *Hoohuli*); *cf. District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988) (injury redressed by elimination of expenditure, rather than by decrease in taxation).

[3] This court has not previously ruled on the different injury requirements, if any, for municipal taxpayer standing.[8] It seems to us, however, that the *Doremus* requirement of a pocketbook injury applies to municipal taxpayer standing as well as to state taxpayer standing. *Doremus* itself, while treating the specific question of state taxpayer standing, quoted a municipal taxpayer standing case for the proposition that a direct injury was necessary. *See Doremus*, 342 U.S. at 434 (quoting *Massachusetts (Frothingham)*, 262 U.S. at 448). The Court in *Doremus* then harmonized its announced rule with a school district taxpayer case. *See id.* (discussing *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (assuming standing for school district taxpayer challenge of school board expenditures for transportation of parochial school students)). Subsequent cases have made clear that municipal taxpayer standing

---

[8] In *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985), an establishment clause case, we observed that the United States Supreme Court had at least recognized different rules regarding federal, state, and municipal taxpayer standing in various settings. *See id.* at 1532. We did not take that opportunity to compare the *Doremus* requirement of a pocketbook injury for state taxpayer standing and the *Frothingham* requirement of a municipal expenditure for municipal taxpayer standing. *Id.*

is only available when there is an expenditure of municipal funds challenged; courts in other circuits often have applied *Doremus-like language to express this rule. See, e.g., District of Columbia Common Cause*, 858 F.2d at 4 (explicitly applying the *Doremus* rule to municipal taxpayers); *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1469-70 (7th Cir. 1988) (municipal taxpayers have standing to challenge the improper use of tax revenues but no standing where there has been no expenditure of city funds); *Hawley v. City of Cleveland*, 773 F.2d 736, 741-42 (6th Cir. 1985) (municipal taxpayers may enjoin improper municipal expenditures), *cert. denied*, 475 U.S. 1047 (1986); *Donnelly v. Lynch*, 691 F.2d 1029, 1031 (1st Cir. 1982) ("municipal taxpayers . . . have standing to sue to challenge allegedly unconstitutional use of their tax dollars"), *rev'd on other grounds*, 465 U.S. 668 (1984). In fact, even those who have taken a dimmer view on the breadth of state taxpayer standing than this court have recognized that municipal taxpayer standing requires no more injury than an allegedly improper municipal expenditure. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612 (1989) (Kennedy, J.) (distinguishing the standing requirements for municipal taxpayers from those for state taxpayers, who must have a "direct injury" like that required of federal taxpayers)[9]; *Taub v. Commonwealth of Kentucky*, 842

---

[9] In this portion of the opinion, which was otherwise written for an unanimous eight-justice Court, Justice Kennedy was able to garner only four votes; the other four justices expressly disavowed Justice Kennedy's discussion of the injury aspect of state taxpayer standing. *See* 109 S.Ct at 2053-54 (Brennan, J., concurring). In *Bell v. City of Kellogg*, 922 F.2d 1418 (9th

(Continued on following page)

F.2d 912, 917-19 (6th Cir.) (rejecting *Hoohuli* and restricting state taxpayer standing in non-establishment clause cases to that available to federal taxpayers, while leaving the municipal taxpayer standing rules unchanged), *cert. denied*, 488 U.S. 870 (1988); *Donnelly*, 691 F.2d at 1031 (the restrictive view of federal taxpayer standing may apply to state taxpayer standing as well, but not to municipal taxpayer standing). Thus, we conclude that municipal taxpayer standing simply requires the "injury" of an allegedly improper expenditure of municipal funds, and in this way mirrors our threshold for state taxpayer standing.

Our next inquiry is whether appellants have, in fact, established the requisite "pocketbook" injury. In *Hoohuli*, state taxpayers challenged a Hawaiian program which was designed to disburse benefits to state residents who were descendants of the aboriginal inhabitants of the islands. The program, established pursuant to an amendment to the state constitution, involved the expenditure of tax dollars through an administrative division (the Office of Hawaiian Affairs) created to implement the amendment. *Hoohuli*, 741 F.2d at 1172. The taxpayers protested the " 'appropriating, transferring, and spending. . . . of taxpayers' money from the General Fund of the State Treasury. . . . ' " *Id.* at 1180. The taxpayers

---

(Continued from previous page)

Cir. 1991), we implied some sympathy toward Justice Kennedy's view. *See id.* at 1423 (citing Justice Kennedy's opinion for state taxpayer standing principles). However, we also made clear that *Hoohuli* remained the controlling circuit precedent. *See id.* (citing *Hoohuli*). *Bell* should not be interpreted as altering the law of this circuit on state taxpayer standing.

alleged that the program saddled them with an additional tax burden and that the revenues would be unlawfully spent to support the "class" of Native Hawaiians. *Id.* The court found the case to fit the description of a "good-faith pocketbook action" under *Doremus*. *Id.*

[4] Similarly, appellants' allegations satisfy the *Doremus* pocketbook injury requirement for standing. They have set forth their status as state and municipal taxpayers and specifically have stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the Good Friday holiday.

[5] The government contends that taxpayers as such cannot have standing to challenge section 8-1 because the bare declaration of Good Friday as a state holiday does not, standing alone, involve any expenditure of tax revenues. This argument cannot prevail. Legislative enactments are not the only government activity which the taxpayer may have standing to challenge. *See id.* (contrasting state taxpayer's ability to challenge executive conduct with federal taxpayer's) (quoting *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 218 n.30 (D.C. Cir. 1976)); *see also Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988) (federal taxpayers have standing to challenge executive or administrative grants made pursuant to Congress' taxing and spending powers); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (assuming without question that school district taxpayer has standing to challenge school board reimbursement of parents for public transportation fares incurred by their children traveling to parochial schools); *District of Columbia Common Cause*, 858 F.2d at 8-9 (municipal

taxpayers may challenge District of Columbia's expenditure of public funds to influence the outcome of an initiative); *Hawley*, 773 F.2d at 741-42 (municipal taxpayers may challenge city lease of airport terminal space to church where the lease agreement could have a detrimental impact on the public fisc). The complaint asserts that section 8-1 proclaims a state holiday in violation of the federal and state constitutions, and that state and municipal tax revenues fund the paid holiday for government employees. The collective bargaining agreements entered into by the government incorporate the challenged statute. In our view, this allegation identifies an expenditure of public funds sufficiently related to appellants' constitutional claim.

2

Having recognized an injury allegedly suffered by the taxpayer, we now consider the causation and redressability requirement. Causation and redressability are essentially identical requirements where the remedy is an order to desist. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing elements of standing); *District of Columbia Common Cause*, 858 F.2d at 5 (considering municipal taxpayer standing).

The district court impliedly found that appellants have established causation and redressability. *Cammack*, 673 F. Supp. at 1528 (determining that the injury would be remedied by a favorable decision). Appellants' asserted injury is the impermissible advancement of religion effected by the recognition of Good Friday as a state holiday and the expenditure of tax revenues to public employees for not working on that day. "If this court

strikes down Hawaii Rev. Stat. § 8-1 as constitutionally flawed, the alleged entanglement between the State of Hawaii and religion would be terminated." *Id.* Ceasing the government's expenditure of public monies on the holiday could be accomplished by voiding some portions of the collective bargaining agreements on public policy grounds, or at the least by requiring that the agreements be revised in the next round of contract negotiations. *Id. See generally District of Columbia Common Cause*, 858 F.2d at 5 ("The injury – misuse of public funds – is redressed by an order prohibiting the expenditure.") (citations omitted).

3

In summary, we conclude that appellants have standing as both state and municipal taxpayers to challenge the expenditure of tax revenues on paid leave days for the Good Friday holiday. Appellants have asserted the necessary injury – actual expenditure of tax dollars – and that a successful challenge would remedy the injury. This notion of standing is consistent with the traditional judicial hospitality extended to establishment clause challenges by taxpayers generally. *See, e.g., School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985) (listing cases involving establishment clause challenges by state taxpayers to programs aiding nonpublic schools); Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 267-72 (1988) (describing, with some skepticism, the limited establishment clause exception to the general rule against federal taxpayer standing).[10]

---

[10] Our conclusion renders consideration of other possible bases for standing – the denial of access to state facilities and services, some plaintiffs' status as public employees – unnecessary.

IV

The first amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I. The establishment clause is made applicable to the states by the fourteenth amendment. *Everson*, 330 U.S. at 5.

[6] Recently the Supreme Court stated that it "has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization." *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 3099 (1989). The establishment clause, however, "permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Id.* at 3135 (Kennedy, J., concurring and dissenting) (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

A

The government argues that this case is controlled by *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court upheld the Nebraska state legislature's practice of opening its daily sessions with a prayer from an official chaplain, who was compensated for his services from the state treasury. The Court explained that legislative prayer was "deeply embedded in the history and tradition of this country[,] [f]rom colonial times through the founding of the Republic and ever since." 463 U.S. at 786.

[7] Hawaii's recognition of Good Friday stems back to its days as a territory; the holiday has been celebrated

for longer than Hawaii has even been a state. Nonetheless, it cannot be said that the Good Friday holiday is as deeply embedded in the fabric of the state as was legislative prayer in *Marsh*. We are reluctant to extend a ruling explicitly based upon the "unique history" surrounding legislative prayer, *id.* at 791, to such a different factual setting. As the Court noted recently, the impact of the activities challenged in *Marsh* were largely confined to the internal workings of a state legislature. *See County of Allegheny*, 109 S.Ct. at 3106 n.52. In contrast, a public holiday can affect the entire populace. We reject the government's contention that *Marsh* controls the disposition of this case.

B

Although the Supreme Court has rejected any absolute approach in applying the establishment clause, it has generally relied upon the test first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Mueller v. Allen*, 463 U.S. 388, 394 (1983); *accord Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2370 (1990) (plurality opinion).[11]

[8] In *Lemon*, the Court stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed

---

[11] Although the *Lynch* Court insisted that it was not confined to the *Lemon* test in analyzing establishment clause cases, *see* 465 U.S. at 679, in fact in only one such case over the past twenty years had the Court failed to apply it: *Marsh v. Chambers*. *See also Larson v. Valente*, 456 U.S. 228, 252-55 (1982) (applying one prong of *Lemon* test after stating that its application "is not necessary to the disposition of the case before us").

> by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612-13 (quotation and citation omitted). The challenged statute must satisfy all three prongs of the *Lemon* test to comport with the establishment clause. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

1

The first prong of the *Lemon* test requires that the statute at issue have "a secular legislative purpose." *Lemon*, 403 U.S. at 612. Generally, in applying this prong, the Supreme Court has considered whether the purpose of the legislation was to endorse religion. *County of Allegheny*, 109 S. Ct. at 3100. Government endorsement of religion has been found when the government conveys or attempts to convey a message that a particular religious belief is favored or preferred, or when it promotes " 'one religion or religious theory against another or even against the militant opposite.' " *Id.* at 3101 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (striking down statute prohibiting teaching evolution)). In *County of Allegheny*, the Court reiterated that it "squarely rejects any notion that this Court will tolerate some government endorsement of religion." *Id.* at 3102 (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

a

[9] The purpose prong is clearly violated when there is no legitimate secular purpose for the legislation. *See, e.g., Edwards,* 482 U.S. at 585-89 (striking down a statute forbidding the teaching of evolution in public schools without accompanying instruction in "creation science"); *Wallace v. Jaffree,* 472 U.S. 38, 56-60 (1985) (striking down a statute mandating a period of silence in public schools for meditation or voluntary prayer). If the Court can describe the "actual purpose" of the act as religious, due to an absence of sincerely held, legitimate secular purpose, then the legislation must fall. *See id.* at 56 (quoting *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring)) (stating "actual purpose" test).

When there are both religious and legitimate, sincere secular purposes motivating legislation, it appears that the existence of the secular purpose will satisfy the first *Lemon* prong. *See id.* ("[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, . . . the First Amendment requires that a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion.") (citations omitted, emphasis added). In *Lynch v. Donnelly,* the Court noted that the city of Pawtucket had "a" secular purpose for its creche display, and therefore the purpose prong was satisfied. *See* 465 U.S. at 681. The Court rejected the argument that the government's purpose must be entirely secular. *See id.* n.6. ("Were the test that if the government must have 'exclusively secular' objectives, much of the

conduct and legislation this Court has approved in the past would have been invalidated.").

[10] The Supreme Court most recently examined the secular purpose prong of the *Lemon* test in *Bowen v. Kendrick*, 487 U.S. 589 (1988). In that case, the Court upheld the Adolescent Family Life Act, which permitted federal grant money to be awarded to organizations, including religious organizations, providing care to pregnant adolescents or adolescent parents. The Court stated that a statute will fail the purpose prong "only if it is motivated wholly by an impermissible purpose." *Id.* at 602. The Court observed that the challenged statute appeared to be "motivated primarily, if not entirely, by a legitimate secular purpose." *See id.* Thus, it was indisputable that "religious concerns were not the *sole motivation* behind the Act" and it could not be said that the Act "lacks *a legitimate* secular purpose." *See id.* at 602-03 (emphasis added). Looking beyond the face of the statute, the Court concluded that "the parts of the statute to which appellees object were *also* motivated by *other*, entirely legitimate secular concerns." *See id.* at 603 (emphasis added). Because there were legitimate secular purposes, it could not be said that Congress' " 'actual purpose' . . . was one of 'endorsing religion.' " *See id.* (quoting *Edwards*).[12]

---

[12] The dissent criticizes our reliance upon *Kendrick* in discerning the correct formulation of this prong of the *Lemon* test. *Kendrick* is both the most recent Supreme Court establishment clause case examining the purpose prong, and the only case since *Lynch* which addressed competing secular and sectarian

(Continued on following page)

[11] In reviewing a challenged statute for a secular purpose, we must be "reluctant to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-395; *see also* Note, *The Transfiguration of the* Lemon *Test: Church and State Reign Supreme in* Bowen v. Kendrick, 32 Ariz. L. Rev. 365, 369-71 (1990) (describing Supreme Court's reluctance to deem legislation violative of the first prong of the *Lemon* test in the face of a plausible legislative purpose); *id.* at 385 ("Any avowed legislative purpose will be valid, even if it coincides with a purely sectarian [enterprise]."). The statement of such purpose, however, must be sincere and not a sham. *Edwards*, 482 U.S. at 586-87; *see also Kendrick*, 487 U.S. at 604 (quoting *Edwards*) (stating that Congress' expressed purposes were sincere). In determining the legislative purpose, courts may consider "the statute on its face, its legislative history, or its interpretation by a responsible administrative agency." *Edwards*, 482 U.S. at 594. Courts may also consider the

---

(Continued from previous page)

purposes. Nowhere in *Kendrick* is there even a hint that the Court was searching for a *primary* purpose.

When, in contrast to the situation which we face here, only *one* legislative purpose animates a governmental act, then it is sound to evaluate such "actual" purpose. In the cases cited by the dissent to justify an "actual" purpose analysis, the Court was faced with *no* legitimate secular purpose whatsoever, and understandably focused upon the legislature's one "actual" purpose. *See Edwards*, 482 U.S. at 585-89; *Wallace*, 472 U.S. at 56-60; *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

historical context of the statute and the specific sequence of events leading to the passage of the statute. *Id.* at 595.[13]

b

Given this guidance for the appropriate application of the purpose prong of the *Lemon* test, we turn to the facts of this case. The legislative history of section 8-1 and its predecessors informs us as to its purpose.

[12] An examination of the legislative history surrounding the 1941 bill, which ultimately became law, and the earlier bills, which failed to establish a Good Friday holiday, demonstrates that the primary concern motivating selection of the holiday was simply timing. For example, the 1941 bill provided for the creation of two new holidays, Lincoln's Birthday and Good Friday. It is clear from the Senate Standing Committee report

---

[13] The dissent's fear that our formulation of the purpose test "effectively gut[s] this prong," *see* Dissent at 10885, is misplaced. The dissent worries that a creche or star of David could be installed on government buildings for the legitimate, secular purpose of aesthetics, and thus presumably would survive the first *Lemon* prong. This is no objection to the *Kendrick* formulation of the purpose prong. For one thing, even under the dissent's version of the test, if aesthetics were the "primary" purpose behind the legislature's actions, the display would pass the dissent's test as well. More to the point, the display would almost certainly fall on the second, "effects" prong of the *Lemon* test, described below. *See County of Allegheny*, 109 S. Ct. at 3103-05, 3112-15 (determining constitutionality of creche and menorah displays on "effects" prong). A three-pronged test need not be recrafted simply because one may hypothesize an unconstitutional act which survives one of the prongs.

accompanying the bill that the committee was most interested in the timing of the proposed new holidays:

> This bill designs to add Lincoln's Birthday and Good Friday to the list of territorial holidays.
>
> Your committee feels that Good Friday should be set aside as a legal holiday but feels that, inasmuch as Washington's Birthday is a legal holiday and falls within the short month of February, to have another holiday within that month would be inadvisable.

Haw. Sen. Stand. Comm. Rep. No. 296 (H. Bill No. 154), *reprinted in* 1941 Haw. Sen. J. 710. Nothing in the legislative history concerning the 1941 bill suggests a religious motivation for its ultimate passage. Indeed, the legislature's approval of both proposed holidays and the governor's expressed opposition, because "the holidays were getting a bit thick about that time of year," betray no particular interest in the secular or sectarian origins of either day.

The legislature's consideration of earlier attempts to have Good Friday declared a public holiday are similarly devoid of sectarian influences.[14] A 1929 bill proposing establishment of Good Friday as a legal holiday was tabled because the state senate's Committee on Judiciary determined "that there are already enough legal holidays." Haw. Sen. Stand. Comm. Rep. No. 225 (Sen. Bill No. 136), *reprinted in* 1929 Haw. Sen. J. 727. A second bill

---

[14] Although the earlier bills did not become law, their legislative history is relevant as the history of the 1941 bill which enacted Good Friday as a legal holiday. *See Edwards*, 482 U.S. at 594.

was tabled in 1931 because "[y]our Committee sees no good reason for adding to the number of Territorial holidays now prescribed by law." Haw. Sen. Stand. Comm. Rep. No. 239 (H. Bill No. 297), *reprinted in* 1931 Haw. Sen. J. 803.

In 1939, the Hawaii Territorial Legislature passed a bill designating Good Friday as a public holiday. The bill was vetoed by the governor, again due to concerns about the number of holidays already recognized in Hawaii. *See* Governor's Veto Message, H. Bill No. 39, May 3, 1939 ("I have had many objections from business men throughout the Territory to creating additional holidays and I see no reason for adding to those which we now have."). Accompanying that bill was the following committee report:

> There are now ten legal holidays in the Territory, including Thanksgiving, plus primary and general election days. Public sentiment is divided on the advisability of creating Good Friday a legal holiday. Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally strongly that Good Friday being in theory at least a day of solemn religious observance by the members of the various churches and religious denominations should be given legal sanction. More and more churches are now conducting the three-hour service on that day and many business houses are allowing their employees to take time off for this purpose. If the legislature should feel that we should have more legal holidays than we now have, it would seem that in view of the religious significance of Good Friday observance of this

> day would have as much justification as Thanksgiving or Christmas.

Haw. H. Stand. Comm. Rep. No. 254 (H. Bill No. 39), *reprinted in* 1939 Haw. H.J. 890.

[13] The district court concluded that a fair reading of the 1939 committee report demonstrates that the primary purpose of the bill was to have more legal holidays. We happen to agree, recognizing, of course, that this clearly secular purpose need not even be "primary" to satisfy the purpose prong. Although the passage recognizes that some people consider Good Friday to be a " 'solemn religious observance,' " the legislative purpose for the bill was that Hawaii " 'should have more legal holidays.' " *Cammack*, 673 F.Supp. at 1534 (quoting committee report). Read in the context of the earlier, tabled bills, the governor's veto of the 1939 bill, and the 1941 enactment, it seems clear that the statute had at least *a* legitimate, sincere secular purpose.

[14] Furthermore, even to the extent that an improper purpose could be gleaned from the statute's legislative history, that would not compel a finding of improper purpose now, some fifty years later. *See McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (noting that the *present* purpose of Sunday closing laws is to provide a uniform day of rest of all, regardless of the religious origins of the laws). The most ardent proponents of the statute in this litigation are the labor unions who have incorporated the statutory holidays into their collective bargaining agreements with the state and local governments. This is a strong indicant that the purpose animating the challenged act is not so much state sponsorship of religion as

state sensitivity to the concerns of organized labor. *See id.* at 435 (noting involvement of labor groups in passage of Sunday closing laws); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 595 (1961) (the challenged Sunday blue law "was promoted principally by the representatives of labor and business interests"); *Franks v. City of Niles*, 29 Fair Empl. Prac. Cas. (BNA) 1114, 1117 n.5 (N.D. Ohio 1982) (rejecting establishment clause challenge to municipal Good Friday holiday, in part because of union involvement in selection of recognized holidays).

C

[15] It is of no constitutional moment that Hawaii selected a day of traditional Christian worship, rather than a neutral date, for its spring holiday once it identified the need. The Supreme Court has recently identified as an "unavoidable consequence of democratic government" the majority's political accommodation of its own religious practices and corresponding "relative disadvantage [to] those religious practices that are not widely engaged in." *See Employment Div. v. Smith*, 110 S. Ct. 1595, 1606 (1990). "[T]he government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987).[15] When applying the first prong of the *Lemon* test,

---

[15] This and the cases which are discussed below make clear that "accomodation" is not a principle limited to "burdens on the free exercise of religion," despite Justice

(Continued on following page)

the secular purpose need not be unrelated to religion; "[r]ather, *Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court rejected an establishment clause challenge to a program whereby public schools released students for a limited time for off-campus religious instruction. On behalf of the Court, Justice Douglas explained that a legislative act motivated by a legitimate secular purpose is not unconstitutional simply because it accommodates the religious practices of some citizens:

> When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, if follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . The government must be neutral when it comes to competition between sects. It may not trust any sect on any person. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its

---

(Continued from previous page)

Blackmun's remark suggesting the contrary in *County of Allegheny*. *See* 109 S. Ct. at 3105 n.51. The *County of Allegheny* footnote does not purport to describe the outer limits of permissible accommodation.

> doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.

Id. at 313-14. The Court explicitly rejected the view that "separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." *Id.* at 315. The Court described such a view as "a philosophy of hostility to religion" which it could not read into the Bill of Rights. *See id., see also Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617, 627 (1961) (plurality) ("But because the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all.") (citing *Everson*, 330 U.S. at 16); *cf. Lynch*, 465 U.S. at 710 (Brennan, J., dissenting) ("When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities.") (citing *Zorach*).

Hawaii's compliance with the spirit of *Zorach* favorably compares with California's improper recognition of Good Friday in *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976). In *Mandel*, the Governor of California ordered the closing of state offices on Good Friday between the hours of noon and 3:00 p.m. state employees were paid for the three hours of closure. The California Court of Appeal reasoned that the order "cannot plausibly be characterized as serving any 'secular purpose.' " *Mandel*, 54 Cal. App. 3d at 612, 127 Cal. Rptr. at 254.

Unlike the instant case, the time off in California coincided purposefully with the traditional time for worship. Moreover, the personnel manual explaining the reason for the Governor's order stated: " '[i]nasmuch as state offices are closed from 12:00 to 3:00 p.m. on Good Friday, employees are given these hours off *for worship.*' " *Id.* (emphasis in *Mandels*). In this case, however, the employees have the entire day off, not just the three hours associated with the Christian worship period. Appellants concede that Hawaiian public employees are not encouraged in any way to use the holiday for worship.

[16] We conclude that the Hawaii statute has a legitimate, sincere secular purpose, specifically to provide Hawaiians with another holiday, and thus is not motivated "wholly by an impermissible purpose." *Kendrick*, 487 U.S. at 602. There is nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons. That the state legislature was able to accomplish its secular purpose and at the same time accommodate the widespread religious practices of its citizenry is hardly a reason to invalidate the statute. The statute satisfies the purpose prong of the *Lemon* test.

[17] We next consider whether the Good Friday holiday violates the second prong of the *Lemon* test, which requires examining whether the primary effect of section 8-1 is the advancement of religion. *Lemon*, 403 U.S. at 612. "[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations

as an endorsement, and by the nonadherents as a disapproval of their religious choices." *School Dist. of Grand Rapids*, 473 U.S. at 390; *accord Mergens*, 110 S. Ct. at 2371-72 (plurality).

In *McGowan v. Maryland*, the Supreme Court examined whether the Sunday Closing Laws violated the establishment clause because Sunday is predominantly the Sabbath day for Christians. *See* 366 U.S. at 431. Chief Justice Warren's opinion for the Court extensively traced the overtly sectarian origins of such laws. *See id.* at 431-35. As indicated earlier, the Court noted that the proponents of such laws had grown to include secular (particularly labor) organizations. *See id.* at 435. The Court concluded that such laws now had an overriding purpose and effect of establishing a uniform day of rest for the community, rather than of promoting the Christian religion. *See id.* at 444-45. The Court stated that "[t]he present purpose and effect of most of [the laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." *Id.* at 445.

[18] The Sunday Closing Laws provide an apt analogy to Hawaii's ongoing sanction of Good Friday as a legal holiday. Sunday was an appropriate choice for a weekly uniform day of rest because the community to a large degree already so regarded Sunday, due to its religious significance and (no doubt) to the long tradition of Sunday Closing Laws:

> Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps

> detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord.

Id., at 452 (internal footnote omitted). Similarly, given that the evidence in this case informs us that large numbers of Hawaiians observe Good Friday, the legislature cannot be faulted for not selecting a different spring day for a "common day of rest." Many Christians presumably will take at least part of the day off anyway, in order attend religious services, and non-Christians have enjoyed the holiday for fifty years – the entire working life of the vast majority of the public workforce. No enforcement of religion is implicated merely because the legislature is cognizant of these truths. That the special status of Good Friday derives from its religious origin is no more relevant than Sunday's status as the sabbath for the dominant Christian sects; "[t]he cause is irrelevant."

[19] The traditional celebrations of Sundays which so moved the *McGowan* Court, such as family outings and trips to the country, *see id.* at 451-52, are simply the expected benefits of a uniform day of rest. Exactly the same sorts of activities occur on any widely observed public holidays (with the probable exception of Christmas, which is imbued with different rituals) and even on Saturdays. The record evidence on the impact of the Good Friday holiday in Hawaii suggests nothing inconsistent with the observations made in *McGowan*. For example, the Good Friday holiday has become a popular shopping day in Hawaii and businesses have benefited from the three-day weekend created as a result of the

holiday. *Cammack*, 673 F. Supp. at 1535-36.[16] Similarly, citizens are better able to enjoy the many recreational opportunities available in Hawaii. *Id.* at 1536. Such evidence indicates that Hawaii's Good Friday holiday, at least at this late date, fifty years after enactment, cannot be regarded as an endorsement of religion any more than Sunday closing laws may.

In fact, Hawaii's adoption of Good Friday as a legal holiday could be viewed as less "coercive" or "endorsing" of religion than the Sunday blue laws. Under Hawaii's scheme, recognition of the holiday is simply accomplished by closing the office doors; the freed employees may enjoy virtually any leisure activity imaginable. In contrast, the Sunday Closing Laws were originally designed to funnel people into church. *See, e.g., McGowan*, 366 U.S. at 432 (quoting the English law applicable to the colonies at the time of the American Revolution). Thus, most leisure activities were restricted. Even at the time the laws were examined in 1961, there were many limitations on the types of establishments which could be open. *See, e.g., id.* at 423 (Maryland law required closure of dancing halls, opera houses, and bowling alleys); *Two Guys from Harrison-Allentown, Inc.*, 366 U.S. at 585 (Pennsylvania's blue law "generally forbids all worldly employment, business and sports on Sunday");

---

[16] The potential effect on business of a Good Friday holiday was very much on the legislature's mind in considering establishment of the holiday. *See* Haw. H. Stand. Comm. Rep. No. 254 (H. Bill No. 39),*reprinted in* 1939 Haw. H.J. 890 (noting that some believed that too many holidays had a detrimental impact on business, but that many businesses were releasing employees to attend Good Friday services anyway).

Gallagher, 366 U.S. at 620 (Massachusetts law made "generally unlawful Sunday attendance or participation in any public entertainments except for those which are duly licensed locally, conducted after 1 p.m., and are in keeping with the character of the day and not inconsistent with its due observance"). Such Court-approved strictures would seem to broadcast the government's endorsement of the religious purpose of the sabbath, as expressed in the Fourth Commandment, in a far more obvious manner than Hawaii's simple release of its workforce to do whatever tickles the fancy.

[20] The breadth of impact of section 8-1, on its face and by its incorporation into the collective bargaining agreements, contributes to the conclusion that the statute's effect is simply the creation of a paid leave day for many state employees and not the endorsement of religion. Christian employees are not singled out for the paid holiday.[17] Good Friday is a paid leave day for all employees covered by the collective bargaining agreements, regardless of individual beliefs. *Compare Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down program mostly benefitting parents

---

[17] In *Zorach*, the Court upheld a program under which public school students who wished to partake in religious instruction were released from class, for a limited time, to do so, although students who did not receive such instruction were required to remain at their public school. *See* 343 U.S. at 308-09. No classroom studies were conducted for the remaining students during the release time period. *Id.* at 309. Thus, it does not appear necessary to the constitutionality of a program under the establishment clause that the program impact adherents and nonadherents equally.

of parochial school children) *with Board of Educ v. Allen*, 392 U.S. 236 (1968) (permitting textbook loans to parochial school children under a program which benefits all). The paid leave is for the entire day and not only for the three hours associated with the traditional Christian observance of Good Friday. *Compare Cammack*, 673 F. Supp. at 1537 (no evidence in the record that pubic employers encourage church attendance or any other form of religious activity on Good Friday holiday) *with Mandel*, 54 Cal. App. 3d at 612, 127 Cal. Rptr. at 254 (emphasizing limited closing period and explicit encouragement to worship in declaring an executive order closing state offices for a portion of Good Friday unconstitutional).

Another factor in measuring the effect of a governmental action which might be construed as endorsement of religion is context. *See County of Allegheny*, 109 S.Ct. at 3103-04. In *Lynch* and *County of Allegheny*, the issue was how far the government could go toward participating in or endorsing the religious celebration of Christmas. In each case, the Court approved the actual display of religious icons (a creche and menorah, respectively) which were suitably balanced by secular displays.

[21] Good Friday's mere placement on the roll of public holidays, along with other important days of secular and (in some cases) religious significance, diminishes the likelihood of an "endorsing" effect. *Cf. Lynch*, 465 U.S. at 710 n.16 (Brennan, J., dissenting) ("It is worth noting that Christmas shares the list of federal holidays with such patently secular, patriotic holidays as the Fourth of July, Memorial Day, Washington's Birthday, Labor Day and Veterans Day. We may reasonably infer from the

distinctly secular character of the company that Christmas keeps on this list that it too is included for essentially secular reasons.") (citation to federal statute omitted). Good Friday is surrounded by patriotic and historic dates which are all selected for their importance to the citizens of Hawaii. The government's action might best be termed a mere "acknowledgment" of religion. *See id.* at 692-93 (O'Connor, J., concurring) (voting to uphold creche display against establishment clause challenge). Viewed in this context, it is unlikely that an observer would regard Good Friday's inclusion as an endorsement of religion. Closing state offices on that day simply acknowledges Good Friday's status as a holiday observed widely enough (and long enough) that the secular purpose of establishing a uniform day of rest is appropriately achieved by selecting it.

[22] If Hawaii went further toward celebrating the religious elements of Good Friday, such as erecting displays concerning the crucifixion of Jesus, then the absence of secular aspects to counterbalance the religious would probably render the *display* (not necessarily the holiday) unconstitutional under *County of Allegheny*. Christmas displays are prone to establishment clause challenges because they move far beyond a simple governmental accommodation of Christians' desire to have a day to celebrate, and, without a sufficient secular context in which to place the display, cross the line into endorsement of the celebrating religion. Nothing in the display cases, however, provides support to the notion that the mere calendar recognition of such a holiday would have the effect of endorsing the religion. *See, e.g., Lynch*, 465

U.S. at 675-76 (describing nation's long history of recognizing Christmas and Thanksgiving holidays); *id.* at 710 (Brennan, J., dissenting) (recognition of Christmas as a public holiday merely accommodates the calendar of public activities to the citizenry's traditional Christmas observances). In fact, Hawaii's acknowledgment of the holiday lacks any reference whatsoever to religion, unlike the President's Thanksgiving Day proclamations. *See id.* at 675-76. The context of the Good Friday holiday, a minimal accommodation of the religious practices of some Hawaiians, decreases the likelihood of a public perception of endorsement.

Because the primary effect of the Good Friday holiday is secular, we cannot conclude that the holiday is unconstitutional merely because the holiday may make it easier to worship on that day for those employees who may wish to do so. "[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan*, 366 U.S. at 442. Moreover " 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason along, constitutionally invalid.' " *Lynch*, 465 U.S. at 683 (quoting *Nyquist*, 413 U.S. at 771). We conclude that section 8-1 satisfies the effect prong of the *Lemon* test.

3

[23] The third prong of the *Lemon* test requires examining whether the Hawaii statute leads to "an excessive government entanglement with religion." *Lemon*, 403 U.S.

at 613 (quotation omitted). The entanglement prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs. *See* L. Tribe, *American Constitutional Law* § 14-11, at 1226 (2d ed. 1988).

Appellants argue that the entanglement prong is not satisfied because the determination of the holiday depends upon the church's calculation of when Easter occurs each year. The required contact between state and religious bodies, in her view, amounts to excessive administrative entanglement.

Cases in which the Supreme Court has found excessive administrative entanglement often involve state aid to organizations or groups affiliated with religious sects, such as parochial schools. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Lemon*, 403 U.S. 602 (1971). Administrative entanglement is also likely where religious and public employees must work closely together. *See Aguilar*, 473 U.S. at 412-14 (program required on-site monitoring of sectarian schools by public authorities and coordinated planning by public and sectarian figures); *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970) ("the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance"). None of these situations bear on Hawaii's presumed simple reference to an ecclesiastical calendar (or, more likely, the World Almanac) to determine the date of a public holiday.

[24] In *Lynch*, the Court examined whether there was administrative entanglement between the city and the church resulting from the city's creche display. Finding that there were no direct city expenditures for the maintenance of the creche and no evidence of contact between the city and the church regarding the creche, the Court concluded that "[t]here is nothing here . . . like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon*." *Lynch*, 465 U.S. at 684 (quoting *Lemon* 403 U.S. at 619-22). In the case of Hawaii's Good Friday holiday, to the extent that the actual date of the holiday would be determined by resort to church calendars, any such entanglement would surely not be the kind of "comprehensive" and "enduring" entanglement the first amendment prohibits.[18]

Appellants also contend that section 8-1 fails because its passage has resulted in political divisiveness. This divisiveness is purportedly evidenced by the attempts of nonChristian religious groups, including Buddhists and

---

[18] Nor are we persuaded by the reasoning of the Connecticut Supreme Court in *Griswold Inn, Inc. v. Connecticut*, 183 Conn. 552, 441 A.2d 16 (1981). Although the court found that excessive entanglement existed because Good Friday's actual date is determined by ecclesiastical calendars, the court also was faced with a significant additional wrinkle. In the challenged statute, Connecticut had banned the sale of liquor on Good Friday only. Thus, the state was forced to monitor alcohol sales on Good Friday and, in effect, "enforce observance of a religious holiday" by liquor licenses. 441 A.2d at 22. There is no such entanglement in Hawaii's simple closure of state offices.

Baha'is, to have significant days in their religious calendars declared legal holidays by the state legislature.

[25] Although political divisiveness has been considered in establishment clause cases, *see, e.g., Nyquist,* 413 U.S. at 796, it has never been relied on "as an independent ground for holding a government practice unconstitutional." *Lynch,* 465 U.S. at 689 (O'Connor, J., concurring); *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints,* 483 U.S. at 339 n.17 (quoting and following *Lynch*). In any event, we are unpersuaded that political divisiveness occurred as a result of the Good Friday holiday. There is no showing that the nonChristian sects' attempts to have certain days declared state holidays were prompted by enactment of the Good Friday holiday. Indeed, these "controversies" appear to have occurred some two or three decades after Good Friday's declaration as a legal holiday. We cannot conclude that the enactment of section 8-1 has resulted in political divisiveness. The Hawaii statute satisfies the entanglement prong of the *Lemon* test.

V

[26] It is difficult to imagine that the average Hawaiian citizen would view Hawaii's inclusion of Good Friday on a list of state holidays as any more a law establishing a religion than is the current inclusion of Christmas on the same list. *Cf. County of Allegheny,* 198 S. Ct. at 3121 (O'Connor, J., concurring) ("The question . . . , in short, is whether a reasonable observer would view such longstanding practices [including recognition of Thanksgiving as a public holiday] as a disapproval of their particular

religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.") (citing L. Tribe, *American Constitutional Law* 1294-96 (2d ed. 1988)); *id.* at 3138 (Kennedy, J., concurring and dissenting) ("The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.").[19]

---

[19] We do not accept the contention that the observation of "Good Friday" in the Western Christian world has become "secularized" in the same manner as Thanksgiving and Christmas celebrations have become in this country. Rather, we do not regard the distinction as constitutionally significant. What the *Lemon* test requires is that we inquire into the purpose and effect of Hawaii's recognition of this holiday. Hawaii's recognition of Good Friday as a public holiday, we conclude, is sufficiently focused toward its secular purpose and, after 50 years, has resulted in secular effects such that an objective observer, "acquainted with the text, legislative history, and implementation of the statute." *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring), would not consider the day's recognition an endorsement of religion. *See* Comment, *Endorsing the Supreme Court's Decision to Endorse Endorsement*, 24 Colum. J.L. & Soc. Probs. 1, 17-18 (1990) (noting that the passage of time dulls any message of endorsement because of the significance of a change in status quo; "when a reasonable observer judges a government action, the tradition or novelty of the act is central to his or her analysis"); *see also Walz*, 397 U.S. 677-78 (stressing significance of long history of tax exemptions for religious organizations in weighing their constitutionality). The dissent's preoccupation with the differences between Christmas and Thanksgiving on the one hand, and Good Friday on the other, inevitably succumbs to tautology.

The Hawaii law does not require or endorse any religious activity, and the only public expenditure associated with the holiday is the continued pay accrued by public employees. We are persuaded that nothing more is "established" by the Hawaii statute than an extra day of rest for a weary public labor-force.

AFFIRMED

D.W. NELSON, Circuit Judge, Dissenting:

The holly and the ivy, jingling bells, red-nosed reindeer, and frosty snowmen this is not. What this case *is* about is Hawaii's endorsement, by means of a state holiday, of a day thoroughly infused with religious significance alone. Because I believe that such a state establishment of religion violates both the purpose and effects prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), I respectfully dissent.

I. PURPOSE

A.

The first prong of the *Lemon* test requires that "the statute . . . have a secular legislative purpose." *Id.* at 612. Though this seems rather straightforward, the Supreme Court has subsequently been less clear about how much secular purpose is required to satisfy the test. The critical question is whether *a* or *any* legitimate secular purpose is sufficient or whether the *actual* or *primary* purpose of the legislation must be secular. The majority believes that "a legitimate, sincere secular purpose" is sufficient. *Majority op.* at 10873. For support, it musters the language in *Lynch*

v. Donnelly, 465 U.S. 668 (1984), that "*a* secular purpose" is all that is required, *id.* at 681 n.6 (emphasis added), and in *Bowen v. Kendrick*, 487 U.S. 589 (1988), that only a statute "motivated wholly by an impermissible [i.e., religious] purpose" will fail the purpose prong. *Id.* at 602.

The majority's great reliance on these two cases, however, is troublesome in its selectivity, for the Court has also said quite a few times that more than *a* or *any* secular purpose is required. The most critical instance is Justice O'Connor's concurrence in *Lynch*, where she noted that the purpose prong "is not satisfied . . . by the mere existence of some secular purpose, however, dominated by religious purposes." *Lynch* at 690-91 (O'Connor, J., concurring).[1] Soon thereafter, a majority of the Court, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), adopted Justice O'Connor's *Lynch* language in looking to " 'whether government's *actual purpose* is to endorse or disapprove of religion.' " *Id.* at 56 (quoting *Lynch* at 690 (O'Connor, J., concurring)) (emphasis added. *Edwards v. Aguilar*, 482 U.S. 578 (1987), later quoted the exact same language concerning "actual purpose." *Id.* at 585. That opinion also mentioned the "legislature's *preeminent* [not "wholly"] religious purpose," *id.* at 590 (emphasis added), its "predominate religious purpose," *id.*, the "preeminent purpose . . . to advance the religious viewpoint," *id.* at 591, and "the Act's primary purpose." *Id.* at 592. Previously,

---

[1] It is noteworthy that Justice O'Connor provided the fifth vote for the *Lynch* majority. Therefore, since her concurrence explicitly rejects the notion that *any* secular purpose will do, the majority's cite of *Lynch* on this point is not a cite to a majority holding. The majority, then, is left only with *Kendrick* for support.

Stone v. Graham, 449 U.S. 39 (1980), held that posting the Ten Commandments in schools violated the purpose prong despite an avowed secular purpose. *See Lynch* at 691 (O'Connor, J., concurring).

Even *Kendrick*, which is the majority's only support for its explanation of the purpose prong, *see supra* n.1, cuts both ways. After initially positing a "wholly impermissible purpose" test, *id.* at 602, the Court reverses field in the penultimate sentence of its purpose section: "There is simply no evidence that Congress' *'actual purpose'* in passing the AFLA was one of 'endorsing religion.' " *Id.* at 604 (citing *Edwards* at 589 & 594) (emphasis added).[2]

Analysis of these cases thus reveals that the Supreme Court wishes courts to look to the actual or primary or predominant purpose, rather than to any legitimate secular purpose. The majority, however, does not even grapple with the dilemma of which formula to apply: any legitimate secular purpose or of the actual purpose. Instead, it simply invokes the first without refuting the second. The majority thus selects a formula that effectively reads the purpose prong out of the *Lemon* test.

I firmly believe that "primary" or "actual" secular purpose is both the test that the Supreme Court has articulated and a far preferable formulation. If a legislature need merely come up with *any* secular purpose that

---

[2] In its most recent case on the Establishment Clause, which obviously postdates *Kendrick* the Court's liberal quoting from Justice O'Connor's *Lynch* concurrence makes it clear that the Court continues to adopt that reasoning. *See County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3100-01 (1989).

is sincere and not a sham, we have effectively gutted this prong. For instance, a legislature could decide that a state building would be enlivened by decoration, surely a reasonable secular purpose, and then install a beautiful creche on its staircase or a decorated star of David on its lawn. Both could undoubtedly adorn otherwise dreary government buildings and thereby create an improved aesthetic appearance, but I cannot believe either would pass constitutional muster. A far more logical approach is to examine whether the central or actual purpose behind the government's actions was secular or religious.

B.

Having determined that courts must seek out the primary purpose, the obvious place to start is the legislative history. *Edwards v. Aguilar*, 482 U.S. 578, 594-95 (1987). Though I agree with the majority that the committee report on the 1939 bill is the best evidence of purpose, I cannot subscribe to the majority's exegesis of this report.

The majority believes that a reading of the long paragraph from the 1939 committee report, *quoted in majority op.* at 10869, demonstrates that "the legislative purpose for the bill was that Hawaii should have more legal holidays." *Id.* at 10869-70 (internal quotation omitted). I find such an interpretation baffling. The heart of this paragraph is the juxtaposition of the following two sentences:

> Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally

> strongly that Good Friday being in theory at least a day of solemn religious observance by the members of the various churches and religious denominations should be given legal sanction.

Haw. H. Stand. Comm. Rep. No. 254 (H. Bill No. 39), *reprinted in* 1939 Haw. H.J. 890. This excerpt makes manifest that the division was *not* between those who thought that there were too many holidays and those who thought there were too few. On the contrary, the division was between those who wished to create Good Friday as a legal holiday *because of its religious significance* and those who felt there were too many holidays. In mentioning earlier tabled bills, the majority only reinforces the theory that earlier refusals to enact Good Friday as a holiday were finally overridden by the importance of religious observances of this holy day.

The citations to the legislative history of the 1941 bill, *see majority op.* at 10868, are similarly unhelpful to the majority. The committee report was responding to a bill proposing both Lincoln's Birthday and Good Friday as holidays. The committee "feels that Good Friday should be set aside as a legal holiday but feels that, inasmuch as Washington's Birthday is a legal holiday and falls within the short month of February, to have another holiday within that month would be inadvisable." Haw. Sen. Stand. Comm. Rep. No. 296 (H. Bill No. 154), *reprinted in* Haw. Sen. J. 710. This quotation makes no mention of why the committee felt Good Friday should be adopted as a legal holiday, only that dates governed the decision to reject Lincoln's Birthday. The majority thus greatly

strains its inference in claiming that Good Friday's selection was dictated by calendar concerns.

C.

Even if the primary purpose behind creating *a* new holiday was secular, the decision to choose the specific date of Good Friday was not. In other words, if we look at the decision in two parts – to create a holiday and then to pick a date – the second decision clearly bore a religious purpose. It is difficult to think of more perspicuous language than "in view of the religious significance of Good Friday." Rep. No. 254. Though the majority attempts to get around this, its efforts are unsuccessful. The committee report also noted that Good Friday is a "day of solemn religious observance," *Id.* The purpose of picking the date of the Friday before Easter was primarily motivated by religious concerns. There is no primary secular purpose for picking that date instead of any other.

The majority attempts to rebut this two-part analysis by relying on the principle of accommodation. There is no doubt that " 'the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' " *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n.*, 480 U.S. 136, 144-45 (1987)). However, the Supreme Court has made equally clear that "[g]overnment efforts to accommodate religion are permissible *when they remove burdens* on the free exercise of religion." *County of Allegheny* at 3105 n.51 (emphasis added). *See id.* at 3121 (O'Connor, J., concurring) ("the government can accommodate religion

by lifting government-imposed burdens on religion"); *Wallance v. Jaffree*, 472 U.S. 38 (1985) (no need to accommodate because "no governmental practice impeding students from silently praying," *id* at 57 n.45); *Amos* (accommodation allowed because Congress imposed a "significant burden on a religious organization [by] requir[ing] it . . . to predict which of its activities a secular court will consider religious," *id.* at 336).[3]

Just as *County of Allegheny* found no burden on Christians wishing to display creches, the evidence has not established that any exists here for those who wish to observe Good Friday in a religious manner. In that case, "Christians remain free to display creches in their homes and churches," *County of Allegheny*, 109 S. Ct. at 3105 n.51, and here, Christians may take Good Friday off or seek leave to at least go worship for a few hours. To be sure, not to proclaim Good Friday a state holiday "deprives Christians of the satisfaction of seeing the government

---

[3] The majority argues that "[t]he *County of Allegheny* footnote does not purport to describe the outer limits of permissible accommodation." *Majority op.* at 10871 n.15. Since they have come upon with no cases that push that limit further, their proposition is mere speculation and can hardly help us in this case.

Further, the discussion of *Zorach v. Clauson*, 343 U.S. 306 (1952), is unavailing: *Zorach* was decided before the *Lemon* test was articulated and has never been cited since by a majority of the Court on the issue of accommodation. Justice Kennedy in dissent in *County of Allegheny* relies on *Zorach* for an accommodationist argument, *see* 109 S. Ct. at 3135 (Kennedy, J., concurring in part and dissenting in part), but the present case represents no more of an example of accommodation than did the creche display.

adopt their religious message as [its] own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes." *Id.* Without this statute, Christians would not be prohibited from honoring Good Friday; rather, the day would simply not be a public holiday.

In sum, the actual purpose of the Hawaii's bill was to "give[ ] legal sanction" to the observance of Good Friday. Rep. No. 254. Since accommodation cannot save this statute, I believe that it is clearly violative of *Lemon*'s purpose prong and thus unconstitutional.

II. EFFECTS

The second prong of the *Lemon* test requires the statute's "principal or primary effect . . . [to] be one that neither advances nor inhibits religion." *Id.* at 612 (citation omitted). Justice O'Connor's concurrence in *Lynch* modified this somewhat, arguing that the key is "that a government practice not have the effect of communicating a message of government *endorsement* or disapproval of religion." *Id.* at 692 (O'Connor, J., concurring) (emphasis added). This "endorsement" test has since been adopted by the Court, as *County of Allegheny* has recently made clear. *See id.* at 3100 (noting cases that have used "endorsement"). The majority here, not in disagreement, uses the formula of whether the " 'challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their religious choices.' " *Majority op.* at 10873 (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390

(1985)). The difficulty, I believe, is that they do not follow their own test.

The majority supports its effects section with two different arguments. The first is that this case is similar to *McGowan v. Maryland*, 366 U.S. 420 (1961), where the Supreme Court upheld the constitutionality of Sunday closing laws. The second is that by placing Good Friday in the same *context* as other secular holidays, the state has negated any impermissible endorsement of religion. After discussing my objections to both of these theories, I will explain why I believe this to be a clear instance of state endorsement of religion.

A.

The majority's equation of *McGowan* with this case implies that Sundays and Good Friday at present have similar secular effect. To say these are of comparable secular magnitude is to argue that a candle and the sun are similar because they both give off light. While Sunday holds unique meaning for those of many faiths as well as those of none, Good Friday is still essentially a holiday with Christian connotations. As the majority noted in *McGowan:*

> [I]t is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like . . . Sunday is a day apart from all others.

Id. at 451-52; *see also id.* at 507 (Frankfurter, J., concurring) ("For to many who do not regard it sacramentally, Sunday is nevertheless a day of special, long-established associations, whose particular temper makes it a haven *that no other day could provide.*") (emphasis added).

Good Friday, on the other hand, carries no such wide-ranging appeal. We need think only of the schoolchild who asks her teacher why she gets Sundays and Good Fridays off. The answer must be that the former are days of rest and the latter a commemoration of the death of Jesus Christ. Selecting a state holiday does much more than enable citizens to relax; it communicates a critical message about the state's priorities. *See, infra,* section II-C. While the present effect of Sunday is not to favor one sect over another, that of Good Friday endorses Christianity. As *County of Allegheny* underscored:

> Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.

Id. at 3107 (internal quotation omitted).

The majority also argues that this holiday has been ongoing for fifty years and thus may be analogized to Sunday closing laws. Yet the majority earlier admitted that the "unique history" of legislative prayer in *Marsh v. Chambers,* 463 U.S. 783 (1983), did not apply to this case. *Majority op.* at 10863. Sunday has a history far more intertwined with our nation's founding than Nebraska's

legislative prayer. In fact, Sunday restrictions were in force two centuries before Nebraska even entered the union. *See McGowan*, 366 U.S. at 433. Thus if *Marsh* is not applicable to this case because Good Friday as a holiday has not attained the unique character of Nebraska legislative prayer, certainly *McGowan* cannot apply either. Furthermore, *County of Allegheny* points out that not "all accepted practices 200 years old and their equivalents are constitutional today." *Id.* at 3106. If 200 years does not necessarily suffice to sanitize an otherwise violative establishment of religion, then the fact alone that Hawaii's practice has occurred for 50 years is similarly of little value.[4]

The majority mentions, in addition, that Good Friday "has become a popular shopping day in Hawaii," *majority op.* at 10875, and notes the economic benefits to businesses because of the holiday. I do not gainsay the remunerative nature of the holiday for business, but this is an ancillary result, not a secular effect, of any state holiday. *See Lynch*, 465 U.S. at 685 ("That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not . . . determine the character of the display.").

---

[4] *Marsh* and *McGowan* are cases that are largely based on particular laws' history being intertwined with the state's secular life. Good Friday should not receive similar judicial dispensation, for while "[t]here have been breaches of this command ["that one religious denomination cannot be officially preferred over another"] throughout this Nation's history, . . . they cannot diminish in any way the force of the command" *County of Allegheny*, 109 S. Ct. at 3107.

Finally, to argue that Christian employees alone are not given the day off is to erect a man of material flimsier than straw. The fact that such a statute would be so patently unconstitutional does not shed any light on the present one. Christians and nonChristians alike were free to gaze upon Allegheny's creche, but that quite obviously, did not cure the constitutional flaw.

B.

The Court in *County of Allegheny* reminds us of another crucial aspect of the effects prong: context. A majority of the Court noted that under *Lynch* "the effect of a creche display turns on its *setting*. Here, unlike in *Lynch*, nothing in the *context* of the display detracts from the creche's religious message." *Id.* at 3103-04 (emphasis added). The menorah in *County of Allegheny* was linked with a tree, the creche in *Lynch* was placed amidst other secular symbols, and the funds in *Bowen* were disbursed to religious and nonreligious groups, and all were upheld as constitutional. Without any countervailing secular context, the creche in *County of Allegheny* was found to have violated the Establishment Clause. Here the legislature has created a "creche alone" situation in its declaration of Good Friday as a state holiday. No secular mitigating factors appear to lend context to this decision or to offset the religious nature of this day.

The majority's context argument is that Good Friday's placement on the roll of public holidays amidst secular days diminishes its endorsing effect. *Majority op.* at 10878. The context, in other words, is the list of holidays. Such an argument cannot be maintained. This is

equivalent to saying that if the state erected secular displays on assorted sites, this would balance a creche on another site. Just as the context in that example should not be all displays anywhere in the state or even city, the context here cannot be all holidays, regardless of how temporally far apart.[5] Furthermore, under the majority's context rationale, the state could decide tomorrow that all of holy week or any of the numerous saints' days should be holidays and that their placement on the holiday roll would be balanced by all the other secular holidays. It seems that the majority would support as a state holiday any uniquely religious day on the grounds that because it is a state holiday, it must be of primarily secular content. A greater switch in cause and effect is difficult to imagine. The reason that the holiday roll is filled with patriotic

---

[5] Even were we to buy into this dubious notion that the holiday roll should be the context, Good Friday is not aided. In such a circumstance, the only holidays with any religious origin – Thanksgiving, Christmas, and Good Friday – all belong to the Christian faith. Even Justice Kennedy, who thought that both displays in *County of Allegheny* were constitutional, agrees:

> [I]f a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays or all other faiths, the argument that the city was simply recognizing certain holidays celebrated by its citizens without establishing an official faith or applying pressure to obtain adherents would be much more difficult to maintain.

County of Allegheny, 109 S. Ct. 3139 n.3 (Kennedy, J., dissenting).

and secular days is because the state may not make any laws respecting the establishment of religion.[6]

The majority's other point in its discussion on context is that a state's "mere calendar recognition" of a religious holiday is less of an endorsement of religion than public displays of religious symbols. *Majority op.* at 10878-79. This argument is no more tenable than the last. "Mere calendar recognition" is a euphemism for "state-declared holiday." The majority believes that the state's declaration of a public holiday and its closing of state offices on a purely religious day is somehow less of an endorsement of Christianity than is the erection of a crucifix on state property, and it notes that the display cases have not held to the contrary. Those cases, though, have never discussed the constitutionality of state declarations of purely religious days as public holidays. I believe that such an establishment of religion is clearly more offensive than state decorations with religious themes.

---

[6] The textual sentence that precedes Justice Brennan's footnote that the majority cites, *see majority op.* at 10878, states that "it is clear that the celebration of Christmas has both secular and sectarian elements." *Lynch*, 465 U.S. at 710 (Brennan, J., dissenting). His point is that *because* Christmas is secular, it is on the list of holidays. The footnote admittedly proves the obverse by saying that we may infer its secular context from the company it keeps. *Id.* at 667 n.16. The ultimate point, however, is that Justice Brennan does not state or imply that simple inclusion on the holiday roll confers secularity.

C.

Overall, I cannot believe that the establishment of Good Friday as a state holiday can survive the endorsement test. As Justice O'Connor stressed in her *County of Allegheny* concurrence,

> If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

Id. at 3119 (O'Connor, J., concurring). In this case, the legislature sends the message to nonChristians that it finds Good Friday, and thus Christianity, to be a religion worth honoring, while their religion or nonreligion is not of equal importance. In fact, the government promotes Western Christians above Eastern Christians, whose Easter and Good Friday almost always fall on different dates. By declaring Good Friday a holiday, the state places its imprimatur on both the Christian rites and practices observed on that day and to Western Christianity in general. No other state holiday in the calendar bears anywhere near the religious implications of Good Friday, with the exception of Christmas, whose religious and secular traditions are intertwined. *See infra* section IV. Hawaii's benefit to religion is not "indirect," "remote," or "incidental," *see Lynch* at 683; on the contrary, it is an open and obvious bestowal of approval on a critical religious day for Western Christians.

To order time and mark its passing are unique means by which communities define themselves. In selecting particular state holidays, the polity does more than honor the past; it identifies the people, events, and values from which it draws inspiration and seeks guidance. The celebrations provide a sense of continuity with remote times, bestowing upon the present the virtues of the past. Hawaii's decision, therefore, should not be dismissed as a bagatelle or applauded simply because it provides an additional day of repose; on the contrary, it should be regarded as a weighty, solemn statement, at once reflecting and shaping the collectivity's character.

The majority, I fear, underestimates the importance of such decisions. And yet, we are reminded daily of their role and significance to people around the globe. The French Jacobins are perhaps the most apt example in their swift introduction of their own calendar, which bore new names for months and even dated their accession to power as Year I. In the Third World, victorious revolutionary movements are quick to solemnize historical dates: e.g., November 1st in Algeria, July 26th in Cuba. At this very moment we wonder how long October 17th will remain a national holiday in the Soviet Union. Indeed, the majority need not have searched so far in time or space, as fierce debates over the celebration of Martin Luther King Day attest to our own extreme sensitivity to this issue.

There is, as I have explained, good reason for such emotional reactions. By honoring a given day, the state *endorses* an event as a fair reflection of its beliefs; it *establishes* that event as a privileged repository of its values. Despite the potential for impassioned disputes, a

state is free to do this as far as secular occurrences are concerned – hence the 4th of July, Presidents' Day, Labor Day, or Memorial Day. But the First Amendment must exclude from this list those days that are remembered for their religious significance alone. Today, and with the blessing of the majority, we are told that it need not. I believe that by declaring Good Friday a state holiday, Hawaii has endorsed a day thoroughly infused with religious meaning; such endorsement has

> [t]he effect on minority religious groups, as well as on those who may reject all religion, . . . [of conveying] the message that their views are not similarly worthy of public recognition nor entitled to public support. It was *precisely this sort of religious chauvinism* that the Establishment Clause was intended forever to prohibit.

Lynch at 701 (Brennan, J., dissenting) (emphasis added) (internal footnote omitted). I am unable to countenance such an endorsement.

III. ENTANGLEMENT

Lemon's third prong states that "the statute must not foster an excessive government entanglement with religion." *Id.* at 613 (internal quotation and citation omitted). Though I am troubled by the necessity of having the Western Christian Church dictate the date of a State holiday each year, I would probably concur with the majority that this is not the sufficiently enduring entanglement required to invalidate the law. Further, while I am also concerned by the political divisiveness engendered by such a law, since Buddhists and others have sought to have their religious holidays similarly honored,

I also agree with the majority that this is not sufficient alone to overturn the holiday's establishment. I do not agree, however, that the timing of other religious groups' efforts to enact other state holidays is at all dispositive. In any event, since I would overturn the law on either the purpose or effects prongs, I will not venture to say whether the combination of the date and the political divisiveness would suffice to create political entanglement.

IV. GOOD FRIDAY, CHRISTMAS, AND THANKSGIVING

The district court made the additional effort to show that Good Friday is of a similarly secular nature as Christmas and Thanksgiving. *Cammack v. Waihee*, 674 F. Supp. 1524, 1539 (D. Hawaii 1987) ("this court concludes that Good Friday and Christmas stand on equal footing before the First Amendment"). It is true that the majority does not "accept the contention" that the observance of Good Friday has become secularized to the same extent as celebrations of Christmas and Thanksgiving. *Majority op.* at 10882 n.19. Yet it still notes that the average Hawaiian would view the inclusion of Good Friday as a holiday as no more of an establishment of religion than Christmas, *id.* at 10882, relies on Thanksgiving and Christmas as religious holidays in its context section, *id.* at 10878-79, and makes other analogies between Christmas and Good Friday as religious holidays. *Id.* at 10879. Because I strongly disagree with the theory that Good Friday may be compared in its religious and secular

makeup with Thanksgiving and Christmas, I add this section.

First and foremost, I do not think that the Supreme court agrees either. For example, "[a]s observed in this Nation, Christmas has a secular as well as a religious dimension." *County of Allegheny*, 109 S. Ct. at 3093 (footnote omitted). In fact, "[i]t has been suggested that the cultural aspect of Christmas in this country now exceeds the theological significance of the holiday." *Id.* at n.3. Justice O'Connor has noted, "[T]he celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs." *Id.* at 3121 (O'Connor, J., concurring). Justice O'Connor continued, "Christmas is a public holiday that has both religious and secular aspects . . . " *Id.* at 3122 (O'Connor, J., concurring). *See also Lynch* (Christmas "has very strong secular components and traditions." [465 U.S.] at 692 (O'Connor, J., concurring)).[7]

---

[7] *See also American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), where Judge Posner explained:

> Christmas is a national holiday, celebrated by nonobservant Christians and many nonChristians as well as by believing Christians. It owes its status, in part anyway, to the fact that most Christmas symbology either is unrelated to Christianity or is no longer associated with it in popular understanding. There is nothing distinctively Christian about reindeer, Santa Claus, gift-giving, eggnog, tinsel, toys, retail sales, roast goose, or the music (as distinct from the words) of Christmas carols.

Though the Court has not mentioned Good Friday, it has spoken on Easter: "The Easter holiday celebrated by Christians may be accompanied by certain 'secular aspects' . . . but it is nevertheless a religious holiday." *County to Allegheny*, 109 S. Ct. at 3122 (O'Connor, J., concurring). If Easter, the Easter Bunny notwithstanding, is still in essence a religious holiday, what does that say about Good Friday? Simply stated, good Friday has no secular symbols or accompanying secular celebration.

On one side of the holiday ledger we may place secular symbols: stockings, Santa Claus, elves, reindeer; and pilgrims, Native American maize, turkey, and cranberry; on the other side we place religious symbols: creches, menorahs, palms, and crucifixes. While Good Friday is associated with the religious symbol of Jesus Christ on the cross, it is, very much unlike Thanksgiving and Christmas, associated with no secular symbols at all. In fact, I think that we would insult observing Christians by characterizing Good Friday, a solemn day of worship and reflection on the death of Jesus Christ, as a day of convivial secular celebration. Easter, perhaps because it is a celebration of Jesus' resurrection, does have some secular components such as egg hunts and chocolate bunnies, and may, in this fashion, begin to approach Thanksgiving and Christmas. Good Friday, bereft of secular symbols or joyous festivity, simply does not belong in the same category. Indeed, while the death of Jesus Christ dominates Good Friday, for many, the reigning images of Christmas are the secular Ghosts of Christmas Past, Present, and Yet to Come.

Another telling example is that people of many religions or of no religion at all celebrate Thanksgiving and

even Christmas, but it would be difficult to find atheists, Jews, or Baha'is engaging in Good Friday commemorations. Christmas, indeed, may be seen as a whole season, which the man who is perhaps its greatest secularizer described as "a good time; a kind, forgiving, charitable, pleasant time; the only time I know of, in the long calendar of the year, when men and women seem by one consent to open their shut-up hearts freely, and to think of people below them as if they really were fellow-passengers to the grave, and not another race of creatures bound on other journeys." Dickens, *A Christmas Carol* 8-9 (Bantam ed. 1986). To say that such an ecumenical spirit pervades Good Friday is simply untenable. I must agree that there is no evidence that "the Christian holy day of Good Friday has become secularized in any degree during the course of its longtime observance by Christian sects." *Mandel v. Hodges*, 54 Cal. App. 3d 596, 612 (1976). Indeed, "the passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins." *Griswold Inn, Inc. v. State*, 441 A.2d 16, 21 (Conn. 1981) (holding state law banning liquor sales on Good Friday unconstitutional).

I find this equation of Good Friday with Christmas and Thanksgiving both distasteful to practicing Christians, who do not wish a serious day permeated by mirth and levity, and unsettling to adherents of other religions or nonreligious persons, who would not desire their secular celebrations of Thanksgiving and Christmas to be linked to a holiday they could not imagine honoring.

I, therefore, respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NELL A. CAMMACK, et al., Plaintiffs, vs. JOHN WAIHEE, et al., Defendants.	CIVIL NO. 87-0260 (Filed Nov. 23, 1987)

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I.

Background

In 1941, the legislature of the Territory of Hawaii enacted a statute which declared Good Friday, the Friday preceeding Easter, to be a legal holiday. This statute, which is now codified as Hawaii Rev. Stat. § 8-1, provides in pertinent part that Good Friday is "set apart and established as [a] state holiday[]."

In 1970, the Hawaii legislature enacted a statute which recognized that "joint decisionmaking [between public employees and their employers] is the modern way of administering government." Hawaii Rev. Stat. § 89-1. Accordingly, the legislature mandated that terms of public employment were to be determined through a process of collective bargaining. It is agreed by all parties hereto that the number and dates of paid leave days is a

mandatory subject of collective bargaining. All collective bargaining agreements currently in effect between public employees and their employers state, either expressly or through incorporation of Hawaii Rev. Stat. § 8-1, that Good Friday is a paid leave day. These collective bargaining agreements cover approximately 65% of Hawaii's public employees.

The plaintiffs in this action have filed a suit praying this court for a declaration that the Hawaii statute which sets aside Good Friday as a legal holiday is unconstitutional as violative of the United States and Hawaii Constitutions. The plaintiffs' argument is premised on the Establishment Clause of the United State's Constitution's First Amendment, and Article I, Section 4 of the Hawaii Constitution. The plaintiffs also ask this court to rule that the collective bargaining agreements which provide for a day of paid leave on Good Friday are violative of the subject constitutional provisions.

This case came before the court on the plaintiffs' and the defendants' cross-motions for summary judgment. This court, having considered the memoranda in support of and in opposition to the motions, the record on file, and the arguments of counsel finds and orders as follows.

II.

Standing

The defendants argue that the plaintiffs in this action lack standing to prosecute their suit. This court finds that the defendants' argument is not persuasive.

In *Flast v. Cohen*, 88 S.Ct. 1942 (1968), the plaintiffs brought suit to enjoin the allegedly unconstitutional expenditure of federal funds and argued that their standing to bring the suit derived from their status as taxpayers. The Court held that taxpayer standing was available to the plaintiffs, finding "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs." *Id.* at 1953. The Court went on to write in *Flast*, however, that mere taxpayer status is insufficient to establish standing to challenge an allegedly unconstitutional tax or expenditure. "[I]nquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Id.* Thus, even a taxpayer must present an Article III "case or controversy" before he or she may have a day in court.

The contours of an Article III "case or controversy" were defined by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752 (1982). In *Valley Forge*, the Court wrote that

> "at an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'"

Id. at 758 (citations omitted). The *Valley Forge* opinion also firmly established that taxpayer standing is only appropriate in those cases in which legislative action pursuant to the taxing and spending powers is challenged. *Id.* at 762-64. Finally, it should be noted that while *Flast* and *Valley Forge* both dealt with challenges to an action taken by the federal legislature, subsequent opinions of the Supreme Court have extended taxpayer standing to parties who have challenged the actions of state legislatures. *See for example Grand Rapids School District of the City of Grand Rapids v. Ball,* 105 S.Ct. 3216, 3221 n. 5 (1985) (the Court has adjudicated cases involving Establishment Clause challenges to state expenditures).

Applying the foregoing precepts to the instant case leads this court to the conclusion that the plaintiffs herein have adequately established their entitlement to a day in court. As in *Flast,* the plaintiffs in this case have alleged that the Hawaii legislature expends substantial sums of money each year to advance religion. Specifically, the plaintiffs have provided this court with evidence supporting a claim that the personnel costs which are incurred each year in order to give those public employees who are covered by a collective bargaining agreement a day of paid leave on Good Friday amount to $3,400,000.00.

In *Lynch v. Donnelly,* 104 S.Ct. 1355 (1984), the Supreme Court adjudicated a case, apparently premised on taxpayer standing, in which the plaintiffs challenged the constitutionality of a city's decision to include a creche in an annual Christmas display. The creche, whose inclusion in the display gave rise to the alleged injuries in *Lynch,* was acquired by the city for $1,365.00. The annual

expenses for erecting and dismantling the creche amounted to approximately $20.00 each year. Obviously, the state's annual expenditure in the instant case, amounting to millions of taxpayer dollars, far outshadows the apparent challenged expenditure, and concomitant injury, which the *Lynch* court found to give rise to a justiciable Establishment Clause challenge. This court further notes that the taxpayer standing in the *Lynch* case may have derived from the federal government's expenditure of millions of dollars necessitated by granting federal employees a paid holiday on Christmas. *Id.* at 1360-61. Thus, if the Supreme Court found no standing problem that would bar adjudication of the dispute in *Lynch*, it is unlikely that it would find a standing problem in the instant case.

This court also finds that a favorable ruling in this case would remedy the plaintiffs' injuries. As noted above, the plaintiffs argue that they are injured because Hawaii Rev. Stat. § 8-1 impermissibly advances religion, and that therefore, the monies which are expended from the public fisc to effect the statute's mandate is an unconstitutional expenditure. If this court strikes down Hawaii Rev. Stat. § 8-1 as constitutionally flawed, the alleged entanglement between the State of Hawaii and religion would be terminated. Similarly, if this court finds that the subject collective bargaining agreements contain a fatal constitutional defect, the plaintiffs' alleged injuries would be remedied; either the collective bargaining agreements would be voided as contrary to public policy, or the collective bargaining agreements would have to be revised in the next round of negotiations to reflect the

unconstitutionality of including Good Friday as a paid leave day.

For the foregoing reasons, this court finds that the plaintiffs have standing to raise their constitutional challenge in federal court.

III.

Abstention

The defendants in this case have argued that this court should abstain. The defendants maintain that the state courts of Hawaii should rule upon the merits of the instant controversy before this court becomes embroiled in "serious constitutional questions." In essence, this argument is premised on the claims that Hawaii courts could resolve the instant dispute through the application of Hawaii law and that Hawaii courts are amenable to the certification of important questions of Hawaii law by the federal court. The defendants' argument, then, is that the Supreme Court's opinion in *Railroad Commission of Texas v. Pullman Co.*, 61 S.Ct. 643 (1941), calls for abstention in the instant case.

"Abstention from the exercise of federal jurisdiction is the exception, not the rule . . . 'Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.' " *Colorado River Water Conservation District v. U.S.*, 96 S.Ct. 1236, 1244 (1976), *citing County of Allegheny v. Frank Mashuda*

Co., 79 S.Ct. 1060 (1959). The Supreme Court has succinctly defined the legal scenario in which *Pullman* abstention counsels a federal court to defer to a state court adjudication of a dispute. *Pullman* abstention is called for "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River* at 1244. The Ninth Circuit has explained the dual rationale of *Pullman* abstention: (1) "to permit state court interpretations of uncertain questions of state law" and (2) "to avoid premature adjudication of federal constitutional questions." *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985).

This court first notes that it has undertaken its own review of those provisions of the Hawaii constitution which are applicable to the resolution of the instant case. This court has focused its inquiry on Article I, Section 4 of the Hawaii Constitution which contains a provision which is virtually identical to the First Amendment of the United States Constitution. The First Amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion." The Hawaii Constitution provides, in pertinent part, that "[n]o law shall be enacted respecting an establishment of religion." This court has found no case law which leads to a conclusion that the Hawaii courts interpret the Hawaii Constitution differently than the federal courts interpret the United States Constitution in the limited area of Establishment Clause jurisprudence. There is no indication that Hawaii courts, if afforded the opportunity, would accord any lesser or greater protection to its citizens under its own Constitution than they are already afforded under

the Constitution of the United States. Moreover, this court takes judicial notice of the fact that no litigation challenging the constitutionality of a Good Friday holiday is presently pending before the Hawaii courts. Thus *Pullman* abstention is inappropriate in the instant case; application of federal and Hawaii law is likely to yield the same result in the adjudication of the issues presented in this case.

Another argument proffered in support of the defendants' motion to abstain is that Hawaii Rev. Stat. § 8-1 has been preempted by the collective bargaining agreements which are in effect between public employees and their employers. This argument is premised on Hawaii Rev. Stat. § 89-19 which provides, in pertinent part, that Hawaii statutes pertaining to collective bargaining "shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary . . . legislation . . . adopted by the State." This court finds that Hawaii Rev. Stat. § 8-1, which establishes Good Friday as a legal holiday, is in no way conflicting with Hawaii's collective bargaining statutes. Chapter 89 of the Hawaii Revised Statutes, wherein are found the collective bargaining statues, does not mandate that Good Friday be included in all collective bargaining agreements as a paid leave day. The inclusion of this holiday into the collective bargaining agreements is a matter of contract and not a matter of legislation. Furthermore, the argument that the inclusion of a Good Friday holiday into the collective bargaining agreements of approximately 65% of Hawaii's public employees suspends the effect of a validly enacted statute of the state strains credulity. Accordingly, Hawaii Rev. Stat. § 8-1 is not preempted.

For the foregoing reasons, this court will decline to abstain from adjudication of this case.

IV.

Constitutionality of Hawaii Rev. Stat. § 8-1

Having resolved the foregoing issues relating to the suitability of this forum for the presentation of the plaintiffs' challenge in favor of plaintiffs, this court proceeds to the substance of the motions. The plaintiffs and defendants have cross-moved for summary judgment on the issue of whether Hawaii Rev. Stat. § 8-1 violates the Establishment Clause of the United States Constitution and its counterpart in the Hawaii Constitution.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, in any, show that there is no genuine issue as to any material act and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630 (1987). If the moving party meets his burden under Fed. R. Civ. P. 56(c), the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56 "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In *Lynch v. Donnelly*, 104 S.Ct. 1355, 1362 (1984), the Supreme Court reiterated its unwillingness "to be confined to any single test or criterion in this sensitive area"

of First Amendment challenges to legislation. Nevertheless, the *Lynch* opinion indicates that the Supreme Court still usually adheres to the three prong test enunciated in *Lemon v. Kurtzman*, 91 S.Ct. 2105 (1971), in analyzing such challenges. The essential holding of *Lemon* has become a refrain in virtually all federal cases which challenge lesgislative [sic] action which is allegedly violative of the First Amendment.

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.' "

Id. at 2111 (citations omitted).

While the *Lemon* opinion set forth the analysis which is to be used in the resolution of Establishment Clause challenges to legislative action, the opinion also cautioned that a complete separation between the state and religious institutions was not contemplated by the drafters of the First Amendment. Thus, the Court wrote that "[o]ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* at 2112. Accordingly, federal courts have been cautioned not to be overly "reflexive" in resolving Establishment Clause challenges. "In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed . . . The Clause

erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' " *Lynch v. Donnelly*, 104 S.Ct. at 1362, *citing Lemon*, 91 S.Ct. at 2112. Although the Supreme Court decision have sometimes stated that the Establishment Clause erects a "wall" between church and state,

> "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government."

Lynch, 104 S.Ct. at 1359.

The indistinct and variable barrier between religion and the state has a history which is as old as the history of the First Amendment itself. Various legislative acts of the First Session of the First Congress in 1789 give substance to the Supreme Court's observation that "[i]t has never been thought either possible or desirable to enforce a regime of total separation . . . " *Committee for Public Education & Religious Liberty v. Nyquist*, 93 S.Ct. 2955, 2958 (1973). Indeed, on the day after the First Amendment was proposed, "Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many and signal favours of the Almighty God.' " *Lynch*, 104 S.Ct. at 1360 n. 2, *citing* A. Stokes and L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964). President Washington acceded to the Congress's request and proclaimed a "day of thanksgiving to 'offer our prayers and supplications to the Great Lord and Ruler of

Nations . . . " Every President of the United States, with two exceptions, has issued similar proclamations. For example, President Roosevelt's proclamation of 1944 suggested "a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas." *Id.* Furthermore, "[i]n the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate." *Lynch*, 104 S.Ct. at 1359.

Accordingly, the inevitability and, indeed, the desirability of the intermingling of this nation's political and spiritual affairs has been long recognized. As the Supreme Court held in *Zorach v. Clauson*, 72 S.Ct. 679, 684 (1952), "[w]e are a religious people whose institutions presuppose a Supreme Being." "[R]eligion has been closely identified with our history and government . . . The fact that the Founding Fathers believed devotedly that there was a God and that the inalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *School District of Abington Township v. Schempp*, 83 S.Ct. 1560, 1566 (1963). No judicial semantics can alter the fact that the drafters of the First Amendment felt constrained to acknowledge the religious origins of the nascent country during the First Congress and now "[i]t is far too late in the day to impose a crabbed reading of the [Establishment] Clause on the country." *Lynch*, 104 S.Ct. at 1366. Moreover, the Supreme Court has counseled that special consideration should be given to the First Congress's interpretation of the Establishment Clause in First Amendment jurisprudence:

> "[t]he interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress 'was a Congress whose constitutional decision have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.' "

Id. at 1359-60, *citing Myers v. U.S.*, 47 S.Ct. 21, 45 (1926).

Although the Supreme Court has stated that Establishment Clause cases must be decided on a somewhat *ad hoc* basis, the Court has not failed to assist the lower federal courts in making these *ad hoc* determinations by spelling out the various prongs of the *Lemon* test. While the *Lemon* opinion gave lower federal courts a skeletal framework with which to analyze an Establishment Clause case, subsequent opinions of the Supreme Court have fleshed out the framework and provided guidance to lower courts in their application of the three-pronged analysis. Thus, it is incumbent upon this court to review recent Establishment Clause cases decided by the Supreme Court before applying *Lemon* in the instant case.

1. The Purpose Prong.

The *Lemon* opinion holds that "the statute must have a secular legislative purpose." 91 S.Ct. at 2111. "In applying the purpose test, it is appropriate to ask 'whether the government's actual purpose is to endorse or disapprove of religion.' " *Wallace v. Jaffree*, 105 S.Ct. 2479, 2490 (1985). In recent cases, the Supreme Court has made it clear that the legislature's purpose in enacting a statute need not be wholly secular to pass muster under the Establishment

Clause. In *Wallace*, the Supreme Court held that "a statute that is motivated in part by a religious purpose may satisfy the first [prong of the *Lemon* test, but] the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Id.* Similarly, in *Lynch*, the Supreme Court held that *Lemon* requires that a statute have "*a*" secular purpose to satisfy the purpose prong; the *Lynch* opinion firmly rejects the notion that the purpose of a statute must be "exclusively secular" to be upheld. *Id.*, 104 S.Ct. at 1363 n. 6. Thus, it is clear that a statute which is motivated by both sectarian and secular purposes is not offensive to the Establishment Clause.

The Supreme Court has also given lower federal courts guidance on how to determine the legislative purpose behind a statute in an Establishment Clause case.

> "The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose . . . Moreover, in determining the legislative purpose of a statute, the court has also considered the historical context of the statute and the specific sequence of events leading to passage of the statute."

Edwards v. Aguillard, 107 S.Ct. 2573, 2583 (1987).

Supreme Court opinions counsel that courts should be deferential to a state's articulation of a secular purpose, if the court feels that the statement of purpose is sincere and not a sham. *Id.* at 2579. At the same time, however, the Supreme Court has stated that "postenactment elucidation of the meaning of a statute [is] of little

relevance in determining the intent of the legislative contemporaneous to the passage of the statute." *Id.* at 2584 n. 19. Thus, a court should *not* give deference to arguments which are made during litigation regarding the purpose behind a statute, unless those arguments are supported by legislative statements contemporaneous with the enactment of the statute.

2. The Effect Prong.

The *Lemon* opinion states that a statute's "principal or primary effect must be one that neither advances nor inhibits religion." 91 S.Ct. at 2111. To a certain extent, a court's inquiries into the purpose and effect prongs may result in overlap, especially if the legislature's intended purpose has been successfully furthered by the challenged statute. Nevertheless, the Supreme Court has cautioned that the two prongs are conceptually distinct. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or approve of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Wallace*. 105 S.Ct. at 2490 n. 42, *citing Lynch*, 104 S.Ct. at 1368 (O'Connor, concurring).

In *Grand Rapids School District v. Ball*, 105 S.Ct. 3216 (1985), the Supreme Court set out in general terms the significance of the effects prong of the *Lemon* test.

> "[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action

> is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval. of their individual religious choices . . . The question in each case must be whether the effect of the proferred aid is 'direct and substantial' or 'indirect and incidental.' "

Id. at 3226, 3229.

The above quotation from *Ball* makes it clear that, as with the purpose prong, a statute may have sectarian effects and still be constitutionally permissible under *Lemon* analysis. First, the Supreme Court has distinguished between statutes which directly advance religion and statutes which allow religious institutions to advance religion, and therefore confer an "incidental" benefit upon religion. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their purpose. For a law to have forbidden effects under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its activities and influence." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S.Ct. 2862, 2869 (1987) (emphasis in the original).

Second, even if a statute confers a governmental benefit on some particular sect, the statute may still be upheld if its primary effect is secular in nature. "The Court has made it abundantly clear . . . that 'not every law that confers an indirect, remote, or incidental benefit upon [religion] is, for that reason alone constitutionally invalid.' " *Lynch*, 104 S.Ct. at 1364, *citing Nyquist*, 93 S.Ct. at 2965. If, for example, a statute's "effect merely happens

to coincide or harmonize with the tenets of some-. . . religions," the statute does not offend the First Amendment. *Lynch,* 104 S.Ct. at 1364, *citing McGowan v. Maryland,* 81 S.Ct. 1101, 1113 (1961).

The Supreme Court's opinion in *McGowan* is particularly relevant to this court's application of the effects prong of the *Lemon* test to the facts of the instant case. In *McGowan,* the Court scrutinized the constitutionality of Sunday Closing Laws and upheld those laws, writing that

> "[t]hroughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation, and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.

81 S.Ct. at 1115.

Thus, in analyzing the constitutionality of a statute under the *Lemon* test, a court may not confine itself to an examination of those of the statute's effects which might advance religion. Rather, it is incumbent upon the court to make a complete review of *all* the effects of the statute. If a statute's primary effect is secular, the statute may be upheld even though the statute may also have sectarian effects. It is the mission of religious institutions to advance religion, and if an otherwise valid statute allows religious institutions to more successfully embark upon this mission, this does not derogate from the constitutionality of the statute.

3. The Entanglement Prong.

Establishment Clause jurisprudence is perhaps most sparse with respect to the significance of the entanglement prong of the *Lemon* test which counsels against "an excessive government entanglement with religion." *Lemon*, 91 S.Ct. at 2111. The Supreme Court in *Lynch* characterized entanglement as "a question of kind and degree." 104 S.Ct. at 1365.

The First Amendment proscribes two basic types of government entanglement. First, courts should be cautious to ensure that there is no significant financial subsidy of religion by government. The nature of the financial entanglement is of critical importance in application of the *Lemon* test. In *Lynch*, the Supreme Court held that in the absence of "a *direct* subsidy to church-sponsored schools or colleges, or other religious institutions," a finding of excessive government entanglement is not warranted. 104 S.Ct. at 1365 (emphasis added). Second,

courts should be wary of excessive administrative entanglement. Thus, the *Lynch* opinion echoes the *Lemon* and holds that "comprehensive, discriminating, and continuing state surveillance" of the activities of religious institutions is the type of "excessive entanglement" proscribed by the First Amendment. 104 S.Ct. at 1365, *citing Lemon*, 91 S.Ct. at 2114-15.

4. Application of the Lemon Test

Taking into consideration the foregoing outlines of the *Lemon* test, as they have been developed by *Lynch* and other opinions of the Supreme Court, this court is of the opinion that Hawaii Rev. Stat. § 8-1 which establishes Good Friday as a legal holiday in Hawaii *does not* violate the First Amendment of the United States Constitution or Article I, Section 4 of the Hawaii Constitution.

The plaintiffs argue that the legislative history of the statute which establishes Good Friday as a legal holiday leads to the conclusion that the statute was enacted for sectarian purposes. Accordingly, argue the plaintiffs, the statute is constitutionally defective. To prevail on their motion for summary judgment on this theory, the plaintiffs must prove that "there [is] no question that the statute . . . was motivated wholly by religious considerations." *Lynch*, 104 S.Ct. at 1362. The plaintiffs have failed to carry this burden.

The plaintiffs' argument is based upon a reading of the House Standing Committee Report which accompanied a proposed bill that would have enacted a statute establishing Good Friday as a legal holiday in 1939. The pertinent portion of the report reads as follows:

> "There are now ten legal holidays in the Territory, including Thanksgiving, plus primary and general election days. Public sentiment is divided on the advisability of creating Good Friday as a legal holiday. Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally strongly that Good Friday being in theory at least a day of solemn religious observance by the members of the various churches and religious denominations should be given legal sanction. More and more churches are not conducting the three-hour service on that day and many business houses are allowing their employees to take time off for this purpose. If the legislature should feel that we should have more legal holidays than we now have, it would seem that in view of the religious significance of Good Friday observance of this day would have as much justification as Thanksgiving or Christmas."

Haw. H. Stand. Comm. Rep. No. 254-39, *reprinted in* 1939 Haw. H. J. 890. Although the 1939 bill was not passed, the legislative history of that bill is relevant to the history of the 1941 bill which did enact Good Friday as a legal holiday. *See Edwards v. Aguillard*, 107 S.Ct. at 2583 (historical context of the statute and the specific sequence of events leading to the passage of the statute are relevant in determining purpose under a *Lemon* analysis).

A fair reading of the committee report which accompanied the 1939 bill leads to the conclusion that the primary purpose behind the bill was to ensure that legal holidays in the Territory of Hawaii fell with greater frequency. Indeed, perhaps the most importance sentence of

the pertinent paragraph, that sentence which recommends the establishment of Good Friday as a holiday, begins with the phrase "[i]f the legislature should feel that we should have more legal holidays than we now have. . . . " The import of the phrase could hardly be clearer: legislative debate on the bill enacting Good Friday as a legal holiday was prompted by the legislature's view that the Territory needed "more" holidays. This conclusion is further buttressed by an examination of a schedule of Hawaii's legal holidays as they existed before the enactment of the statute which established Good Friday as a legal holiday:

Month	# of Holidays
January	1
February	1
March	0
April	0
May	1
June	1
July	1
August	0
September	2
October	0
November	1
December	1

Revised Laws of Hawaii § 1-21 (1935). As indicated above, there was a three month period which fell between Washington's Birthday in February and Memorial Day at the end of May during which there were no legal holidays. The establishment of a Good Friday holiday provided for an additional legal holiday during the calendar year's longest "holiday-free" period.

The Senate Standing Committee report which accompanied the 1941 bill which eventually established Good Friday as a legal holiday sheds further light on the legislature's primary purpose in enacting the antecedent of Hawaii Rev. Stat. § 8-1 and bears out the conclusion that the purpose was secular in character. The 1941 bill proposed that both Lincoln's Birthday and Good Friday be designated as legal holidays. The report which accompanied the bill states that

> "[y]our committee feels that Good Friday should be set aside as a legal holiday but feels that, inasmuch as Washington's Birthday is a legal holiday and falls within the the [sic] short month of February, to have another holiday within that month would inadvisable."

Haw. Sen. Stand. Comm. Rep. No. 296-41, *reprinted in* 1941 Haw. Sen. J. 710. This language makes the legislature's primary concern regarding the number and frequency of legal holidays apparent. The report on the bill noted that there was not a need for an additional legal holiday in February because of the temporal proximity of Washington's Birthday which was already a legal holiday; the report, however, did advocate the establishment of Good Friday as a legal holiday, presumably because no legal holidays fell during early to mid-Spring.

This case is clearly distinguishable from cases such as *Mandel v. Hodges*, 127 Cal.Rptr. 244 (Cal.App. 1975). In *Mandel*, a California appellate panel scrutinized the constitutionality of an annual executive proclamation declaring a three hour period on the afternoon of Good Friday to be a paid holiday for state employees. The court noted that a personnel manual distributed to state employees

declared that "inasmuch as state office [sic] are closed from 12:00 to 3:00 p.m. on Good Friday, employees are given these hours off for worship." *Id.* at 254. Based upon such an express avowal of religious motivation, the court held that the Good Friday holiday "wholly lacks any 'secular purpose.' " Accordingly, the court found that the holiday violated the First Amendment of the United States Constitution. In the instant case, the expressed purpose of the statute is *not* religious; rather, the purpose of the Good Friday holiday, as noted above, is to give Hawaii's workers a day off as a rest from their daily affairs. Furthermore, the secular nature of Hawaii's Good Friday holiday is evidenced by the fact that the *entire* day, rather than a three hour period which corresponds in length to the traditional religious service, is a legal holiday.

Thus, there is no doubt that the legislature had "a clearly secular purpose" in mind when it enacted the antecedent of Hawaii Rev. Stat. § 8-1. The fact that the legislature was able to coordinate this secular purpose with a religious purpose is not fatal to the statute. Even if this court assumes that the legislature did enact the Good Friday statute with sectarian purposes in mind, to allow the religious to worship on Good Friday and to allow churches to call the faithful to prayer, the existence of these sectarian purposes would not constitutionally flaw the statute. As indicated above in this order, the Supreme Court only requires that a statute have "a" clearly secular purpose to meet the requirements of the *Lemon* test. *Lynch*, 104 S.Ct. at 1363 n. 6.

Therefore, an examination of the 1939 report leads this court to conclude that the Good Friday holiday was

primarily proposed to increase the frequency of legal holidays. It is also noteworthy to point out, as does the State in this case, that the legislative report seems to acknowledge that Good Friday is not an entirely religious day. The 1939 report characterizes Good Friday as "in theory at least a day of solemn religious observances," apparently reflecting the legislature's sentiment that Good Friday had lost much of its religious nature and had become a holiday similar in nature to Thanksgiving and Christmas which have been secularized to some extent over the centuries. Indeed, this court is also of the opinion that Good Friday has attained a secular character; for the majority of Americans Good Friday has become more an integral part of a traditional three day secular celebration of Spring which begins on Good Friday and continues through Easter Sunday than a solemn observance of Jesus Christ's crucifixion.

This court concludes that the secular purpose behind the establishment of the Good Friday is manifest. The legislature does not offend the First Amendment by enacting a statute intended to ensure that the people of Hawaii have an adequate number of leave days. This court further concludes that any ancillary sectarian purpose which the legislature may have had in establishing Good Friday as a holiday is not fatal to the Hawaii Rev. Stat. § 8-1, since "a clearly secular purpose" for the statute exists and since Good Friday, like Christmas, has become secularized to some extent over the centuries.

An examination of the effects of Hawaii Rev. Stat. § 8-1 leads this court to the conclusion that the legislature's intended purpose in declaring Good Friday to be a legal holiday has been fulfilled. While the plaintiffs argue

that the effect of the Good Friday statute is to give Christian sects the imprimatur of State approval, an analysis of the effects of the statue compels this court to find that the secular effects of the statute significantly predominate over the sectarian effects of the statute.

The defendants have submitted the affidavits of Robert Robinson and Lex Brodie in support of their motion for summary judgment. Mr. Robinson is the President and the Chief Executive Officer of the Chamber of Commerce of Hawaii and Mr. Brodie is the President and Owner of National Tire of Hawaii, Ltd. The affidavits support the finding that Good Friday has become a traditional shopping day in Hawaii. Both affidavits state that sales volumes increase on Good Friday, and that the increase in sales volume is almost certainly attributable to the fact that the day is a paid leave day for many workers in the state. The defendants have also submitted a letter from Hiram Kamaka, Director of the City and County of Honolulu's Department of Parks and Recreation. This letter establishes the fact that applications for camping permits on the island of Oahu more than double on the long weekend which includes Good Friday. This letter leads to the inference that Hawaii's population is better poised to take advantage of the state's unique recreational opportunities because of the enactment of the Good Friday statute which creates a "three-day weekend" for many Hawaiians. The salutary effect of increasing the quality of life of workers through the advancement of recreational opportunities was expressly sanctioned by the Supreme Court in *McGowan, supra,* even though the Sunday Closing Laws which were under scrutiny in that case had an incidental religious effect.

Since *Lynch*, it has been well settled that statutes which confer an "indirect, remote, or incidental" benefit upon religion are not offensive to the First Amendment. Furthermore, the opinion of the Supreme Court in *Amos*, quoted above, is particularly apt here and merits reiteration: "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their purpose. For a law to have forbidden effects under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its activities and influence." 107 S.Ct. at 2869. Supreme Court opinions further hold that government's secular celebration of traditional religious holidays is not a constitutionally impermissible "effect." "Government celebration of [Christmas], which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood." *Lynch*, 104 S.Ct. at 1369 (O'Connor, concurring).

In the instant case, there is simply no evidence that the enactment of Hawaii Rev. Stat. § 8-1 has advanced Christianity. The affidavits of the plaintiffs which were attached to the memorandum in support of their motion do not indicate that the inconveniences which have been occasioned by the Good Friday statute are any different in degree or kind than those inconveniences which accompany every legal holiday in the state.

The deposition testimony of the various plaintiffs also supports this court's conclusion that the effects of the Good Friday holiday are no different from the effects of any legal holiday of a more patently secular character. Plaintiff Root testified that although various University of Hawaii libraries were closed on Good Friday and that

although he did not have secretarial services on that day, he was able to attend to his research in his University of Hawaii laboratory. (Root deposition, p. 49.) Plaintiff Root further testified he does not feel that the establishment of the Good Friday holiday discriminates against his adherence to his own religious beliefs. (Root deposition, p. 55.) Plaintiff Cammack testified that the Good Friday has not prevented her from fulfilling her professional obligations. (Cammack deposition, p. 30.) Plaintiff Cammack takes advantage of the Good Friday holiday by visiting with family, shopping, travelling, and resting. (Cammack deposition, pp. 47, 50, 68-69.) Plaintiff Wallace testified that on Good Friday she was able to study in the classrooms at the University of Hawaii, where she was a law student, even though the day is a legal holiday. (Wallace deposition, pp. 39-40.) She also testified that she will have access to the Hawaii Supreme Court's law library on Good Friday when she will serve as a law clerk to a justice on that court. (Wallace deposition, p. 23.) Apparently, the only inconveniences suffered by plaintiff Wallace on Good Friday resulted from the curtailment of various services at public libraries and the reduced holiday schedule of the public bus lines. (Wallace deposition, p. 26.) the reduction in public library services and the closure of a public office building are the only tangible injuries to which Plaintiff Stapleton testified. (Stapleton deposition, pp. 25, 32.) Significantly, plaintiffs Root, Cammack, and Wallace testified that they did not notice any display of religious symbology which they can attribute to the establishment of a Good Friday holiday. (Root deposition, pp. 56, 91; Cammack deposition, pp. 40-42; Wallace deposition, pp. 40-50.) Public employers do not

coerce their employees into attending church on Good Friday and the day is a paid leave day for all employees, regardless of their individual religious choices. The fact that the enactment of the statute may facilitate larger congregations at Good Friday services does not enter into this court's calculus; as noted above, churches are charged with a special mission and if legislative action has the incidental benefit of allowing them to pursue that mission more successfully, such an incidental benefit is in no way offensive to the First Amendment.

The important point here is that days which are religiously significant for one sect may mean different things to different people. A day which is a "holy day" for a Christian may be a "holiday" for a Jew, or a Buddhist, or a Baha'i, or an atheist. While Jews, Buddhists, Baha'is, and atheists may celebrate the advent of Spring on the long weekend which begins with Good Friday by hunting for gaily colored eggs in their gardens, delivering baskets of candies and flowers to family and friends, and other secular activities, Christians may commemorate the death and resurrection of Jesus Christ. Each person is free to emphasize those aspects of the holiday, the secular or the sectarian, which he or she chooses to emphasize, just as each individual is free to focus on the secular or the sectarian facets of our traditional Thanksgiving and Christmas holidays. In *Lynch*, the Court found that federal employees are released from their duties on Thanksgiving and on Christmas, to spend those days as they so choose. *Id.* at 1360-61. Similarly, this court finds that Hawaii's employees may spend Good Friday as they so choose.

Thus, this court acknowledges that the establishment of Good Friday as a legal holiday may have effects which coincide or harmonize with the religious tenets of Christianity, and which incidentally benefit Christians and their churches. Supreme Court "precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch*, 104 S.Ct. at 1364. *Lynch* teaches that such effects are not proscribed by the First Amendment when the primary effect, and, indeed, the intended effect, of the statute is secular, 104 S.Ct. at 1364. It would stand the First Amendment on its head to hold that any secularly motivated statute, which successfully achieved its secular purpose, must be stricken as violative of the First Amendment if the statute also allows a segment of the population to comply with their religious obligations. As the *Lynch* opinion states, the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch*, 104 S.Ct. at 1359.

This court concludes that the primary effect of the Good Friday statute is secular in nature. Specifically, the court finds that the citizens of Hawaii are afforded a needed day off from work on that day; whether the people of Hawaii choose to spend the day at the beach or in their churches is an individual choice which is in no way influenced by the state. Since the primary effect of the holiday is secular, Hawaii Rev. Stat. § 8-1 passes muster under the effect prong of the *Lemon* test.

The plaintiffs' argument that the enactment of a Good Friday holiday has resulted in excessive government entanglement with religion is two-pronged. First, the plaintiffs make an argument raising the spectre of

administrative entanglement; they argue that the enactment of Hawaii Rev. Stat. § 8-1 has been politically divisive because religious sects other than the Christian sects have attempted, and failed, to have significant holy days in their calendar declared legal holidays by the state legislature. For example, the plaintiffs refer this court to the Hawaii legislature's refusal to declare Buddha Day and Baha'i New Year's Day as legal holidays. This court is unpersuaded by this argument of the plaintiffs. While the Hawaii legislature has refused to declare these days as public holidays, a Hawaii statute states that April 8 of each year "shall be known and designated as 'Buddha Day' " and that March 21 "shall be known as Baha'i New Year's Day." Hawaii Rev. Stat. § 8-4. More importantly, any evidence that Buddhists or Baha'is have been motivated to seek holiday status for their respective holy days by the existence of the Good Friday holiday is conspiculously [sic] absent from the plaintiffs' argument. The attempts by these religious sects to have their respective holy days established as legal holidays were made approximately 30 years after the antecedent of Hawaii Rev. Stat. § 8-1 was enacted. Whether the existence of Christmas as a legal holiday in Hawaii, the existence of Good Friday as a legal holiday, or some other motivation unrelated to the current roster of holidays was the initial impetus behind the lobbying efforts to have religious days declared as legal holidays is simply unclear. In the absence of a causal link between the efforts of some religious sects to have certain days declared legal holidays and the establishment of Good Friday as a legal holiday in Hawaii, and in the absence of any evidence of acrimony between the religious sects of this state, this

court cannot conclude that Hawaii Rev. Stat. § 8-1 has been divisive. Furthermore just as in *Lynch*, "[t]his case does not involve a direct subsidy to . . . religious institutions, and hence no inquiry into political divisiveness is even called for." 104 S.Ct. at 1365.

Second, the plaintiffs argue that Hawaii Rev. Stat. § 8-1 results in entanglement because the date of Good Friday is determined each year by reference to an "ecclesiastical" calendar. (At the oral argument on these motions, the plaintiffs' attorney conceded that this entanglement argument is a "weak" argument.) First, this court notes that while Good Friday may be on an "ecclesiastical" calendar, its date in fact is determined by reference to a lunar calendar which exists independently of any religious scripture. Second, the intrusion of religion into government caused by the designation of a "floating" holiday's date by reference to a lunar calendar, if any, is *de minimis* and certainly not the "comprehensive" and "continuing" entanglement which the First Amendment was designed to prevent. *Lynch*, 104 S.Ct. at 1365. This court is not persuaded by, and is in no way bound by, the opinion in *Griswold Inn, Inc. v. Connecticut*, 441 A.2d 16, 22 (1981), in which the court found without any explanation that the reference to an "ecclesiastical" calendar contributed to a finding of entanglement of government with religion. Thus, this court concludes that the Good Friday holiday has not led to excessive entanglement between the state and religion.

The foregoing analysis indicates that the Good Friday holiday was enacted for a secular purpose, has a primarily secular effect, and does not result in excessive entanglement. Accordingly, this court concludes that

Hawaii Rev. Stat. § 8-1 is compatible with the requirements of the Constitution as set out in the *Lemon* test.

5. The Similarity of Thanksgiving, Christmas, and Good Friday

This court has concluded above that the establishment of Good Friday as a legal holiday by Hawaii's legislature is permissible under the *Lemon* test. This conclusion is buttressed by this court's further finding that Good Friday shares characteristics with Thanksgiving and Christmas which render the Good Friday holiday constitutionally permissible under *Lynch*. In *Lynch*, the Supreme Court found that Thanksgiving was traditionally "celebrated as a religious holiday" and that "[t]hat holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance." *Id.* at 1360. Having found that Thanksgiving and Christmas were days of "religious significance," the Court went on to find that the traditional public holidays falling on those days were not offensive to the First Amendment. *Id.* at 1360-61, 1378-79 (Brennan, dissenting). As noted above by the Court in *Lynch*, "the Government has long recognized – indeed it has subsidized – holidays with religious significance." *Lynch*, 104 S.Ct. at 1361.

Language from Justice Brennan's dissenting opinion in *Lynch* is illuminating with respect to government's ability to recognize the sanctity of a religious day within the boundaries prescribed by the First Amendment. Justice Brennan wrote that

> "although the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion . . . [G]overnment does not violate the Establishment Clause when it simply chooses to 'close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.' "

Lynch 104 S.Ct. at 1381 (Brennan, dissenting), *citing Schempp*, 83 S.Ct. at 1610-12 (Brennan, concurring), *Zorach v. Clauson*, 72 S.Ct. 679, 684 (1952). Justice Brennan went on to opine that the foregoing principle justified "government's decision to declare December 25th a public holiday." *Id.*

The similarity in the characters of Thanksgiving, Christmas, and Good Friday is clear. All three holidays are intertwined with the history of our nation. Indeed, Christmas and Good Friday have histories of their own which far exceed in their scope the history of this country; the two days mark the birth and death of Jesus Christ and have been observed for centuries. As this court has noted above, Good Friday, while religious in its origins, has, like Christmas, attained a partially secular character revolving around traditional Spring celebrations. Thus, this court concludes that Good Friday and Christmas stand on equal footing before the First Amendment. Christmas celebrates the birth of Christ, whereas Good Friday commemorates Christ's crucifixion. Both Christmas and Good Friday have been traditionally celebrated and acknowledged as religious holy days by the

Western world for many centuries. The partial secularization of the two holidays is somewhat parallel in that the days have come to signify the advent of seasonal commercial sales, an opportunity to relax with family, and the occasion to engage in traditional seasonal celebrations. Justice Brennan wrote that

> "[w]hen government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step.

Lynch, 104 S.Ct. at 1379 (Brennan, dissenting). What Justice Brennan wrote about Christmas appears to this court to apply with equal force to Good Friday. Each holiday provides Americans with a day off from work and neither holiday calls for the state's administrative involvement in or supervision of the church's affairs.

Thus, the obvious similarities which exist between Thanksgiving, Christmas, and Good Friday insulate the Good Friday holiday from a successful First Amendment challenge. The Supreme Court's holding that Thanksgiving and Christmas, while religiously significant, are nevertheless constitutionally inoffensive as public holidays, mandates that this court similarly find that the Good Friday holiday is constitutionally permissible. The

McGowan decision counsels that traditional public holidays which are also religiously significant days may, through the passage of time, partially lose their sectarian nature and become constitutionally permissible, regardless of legislative intent in establishing those holidays. Good Friday in Hawaii, whatever its intended purpose, has become a traditional and uniform day of rest and relaxation for the citizens of the State. Accordingly, the holiday does not offend either the United States Constitution or the Hawaii Constitution.

V.

Conclusion

To summarize, this court finds that the primary purpose of the statute which established Good Friday as a legal holiday was to increase the number and frequency of legal holidays in the Territory. This purpose is clearly secular. The court also finds that the primary effect of the statute is secular. The Good Friday holiday allows the people of Hawaii to play or to pray as they see fit. Even the plaintiffs concede that many more people can be found in Hawaii's parks and shopping malls on Good Friday than can be found in its churches. Finally, this court finds that the enactment of the antecedent to Hawaii Rev. Stat. § 8-1 has not led to excessive entanglement between religion and the state.

Moreover, this court's finding that Good Friday is similar in nature to Thanksgiving and Christmas provides additional ground for insulating the Good Friday holiday from a successful constitutional challenge. Just as Christmas and Thanksgiving are permissible because of

their partially secular observations and because they provide a uniform day of rest and relaxation for Americans, Good Friday has attained a secular position in this nation's traditional fabric and provides citizens of Hawaii with a uniform day of rest.

For the foregoing reasons, the plaintiffs' motion for partial summary judgment with respect to the constitutionality of Hawaii Rev. Stat. § 8-1 is denied, and the defendants' motion for summary judgment with respect to the constitutionality of Hawaii Rev. Stat. § 8-1 is granted. The statutory establishment of Good Friday as a legal holiday offends neither the United States nor the Hawaii Constitutions.

Having concluded that Hawaii Rev. Stat. § 8-1 is constitutionally permissible, this court finds no basis to conclude that the collective bargaining agreements between public employees and their employers which establish Good Friday as a paid leave day, either expressly or through incorporation of Hawaii Rev. Stat. § 8-1, are in any way violative of the United States or Hawaii Constitutions. Accordingly, the plaintiffs' motion for partial summary judgment with respect to the constitutionality of the collective bargaining agreements is denied, and the defendants' motion for summary judgment with respect to the collective bargaining agreements is granted.

SO ORDERED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NELL A. CAMMACK; GENIE LUCAS; DOUGLAS PAUL ROOT; CAROLYN L. STAPLETON; MICHELE WALLACE, *Plaintiffs-Appellants,* v. JOHN W [SIC]. WAIHEE, in his capacity as Governor of the State of Hawaii; ALFRED LARDIZABAL, in his capacity as Director of Personnel Services of the State of Hawaii; FRANK F. FASI, in his capacity as Mayor of the City & County of Honolulu; JEREMY HARRIS, in his capacity as Managing Director of the City & County of Honolulu; Loretta K. Fukuda, in her capacity as the Director of Civil Service of the City & County of Honolulu; UNITED PUBLIC WORKERS, LOCAL 646, AFSCME; [HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME;] HAWAII STATE TEACHERS ASSOCIATION; UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF; STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS, *Defendants-Appellees.*	No. 87-15073 D.C. No. CV-87-0260-ACK ORDER AND DISSENTS

Filed August 13, 1991

Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain and Stephen S. Trott, Circuit Judges.

ORDER

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge D.W. Nelson would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion. An active judge called for an en banc vote, and a majority of the active judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

DISSENTS

REINHARDT, J., with whom HUG, PREGERSON, POOLE AND NORRIS, JJ, join dissenting from the denial of rehearing en banc.

For the first time, a court has held that a purely religious holy day may be made an official state holiday. Good Friday, the annual date on which Western Christians commemorate the crucifixion of Jesus Christ, is by law a public holiday in Hawaii. State and local government offices are closed and most public employees

receive paid leave. By making Good Friday a public holiday, the Hawaii statute officially consecrates that event. It incorporates a purely religious holy day into the state calendar and says to those not of the majority religion: "Thou shalt celebrate this religious occasion." By doing so, the state of Hawaii establishes religion in violation of the Constitution. Nevertheless, by a 2-1 vote, a panel of this court found the Hawaii statute constitutional. Our refusal to reconsider the decision en banc substantially undermines one of the First Amendment's most critical provisions.

It is not surprising that the Hawaii legislature selected Good Friday rather than, say, Yom Kippur or Ramadan as the date for its additional state holiday. Good Friday is after all the holy day celebrated by members of the majority religion in this country. There are many reasons to be concerned when the government seeks to clothe itself in the religious ritual of the majority, not the least of which is the effect upon those with different views. By consecrating a Christian holy day, the Hawaii legislature has effectively sent the rest of the population a message. That message is not only that the state officially recognizes the religious preference of the majority, but more important, that the state considers the beliefs of those in the minority to be unworthy of similar respect.[1]

---

[1] "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

While official recognition of any or all religions is prohibited by the constitution, the preference of the majority religion over all others is certainly among the principal offenses the first amendment condemns.

Additionally troubling is the impact this message will have on children for whom school is closed on Good Friday. How can parents forthrightly explain to their children the reasons for the official school holiday except by stating that it commemorates the crucifixion of Jesus Christ? Such an explanation is sure to arouse feelings of discomfort, of differentness, of isolation from their teachers and classmates in nonChristian school children, who are even more susceptible to feelings to social alienation than are their parents. *See Edwards v. Aguillard*, 482 U.S. 578, 584-85 (1987); *School District of Abington Township v. Schempp*, 374 U.S. 203, 289-290 (1963) (Brennan, J., concurring). It is unfortunate that, still today, so many adherents of the majority religion fail to comprehend the psychological effect that the state's endorsement of that religion has upon children whose views and upbringings differ from their own.

Our refusal to grant en banc consideration is disturbing for other reasons as well. The significance of our decision in this case goes beyond the issue of religion. The majority opinion reflects a growing willingness to accept the imposition of majoritarian control at the expense of individual rights. Ours is a heterogeneous society in which tolerance of different ideologies and views has historically been enforced and encouraged through the first amendment. Yet in recent years we have witnessed increasing legislative restrictions on individual

freedom in laws regulating religious practice, sexual conduct, and nonobscene expression. And we have witnessed an increasing willingness on the part of the judiciary to allow the social, moral, and cultural precepts of the majority to dictate the choices available to those with different views.

We are creeping closer and closer to a state-imposed orthodoxy – an orthodoxy firmly outlawed by a Bill of Rights that the courts are supposed to enforce with vigilance. Our ruling upholding the official consecration of Good Friday is an unfortunate step toward that state of orthodoxy, toward the establishment of an officially preferred ideology governing the views and conduct of all Americans. While the sanctioning of an official religious holiday may appear to be only a minor Constitutional violation, every measure by which the majority is enabled to exert dominion over the personal beliefs and values of the minority does serious injury to our fundamental liberties.[2]

---

[2] The playwright Arthur Miller has warned that

> [p]eople ought to ask themselves why such good men as Washington, Jefferson and the rest took such explicit steps to keep praying out of politics. It was to spare America the inevitable misuse of religiosity-by-government that had helped to fasten tyranny on Europe. . . . For the United States to take a single step down that road is not merely folly but a destruction of policy that has worked beautifully for two centuries and has attracted the respect and envy of persecuted religious people everywhere in the world.

A. Miller, "School Prayer: A Political Dirigible," N.Y. Times, March 12, 1984, at A17, col. 1.

The decision which we refuse to consider en banc is clearly contrary to existing legal doctrine. As the following brief review of the central legal issues demonstrates, the Hawaii law violates both the "purpose" and "effect" prongs of the *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, the majority opinion does not merely misapply the law; it creates a substantially weaker Establishment Clause jurisprudence in our circuit. It is particularly unfortunate that, at a time when official tolerance for minority views is decreasing, our court is not even willing to pause momentarily in order to reflect en banc before joining the rush toward unrestrained majoritarianism.

I

Purpose

As the majority opinion recognizes, a necessary condition for upholding a statute challenged on Establishment Clause grounds is that the statute have "a secular legislative purpose." Slip op. at 10864 (quoting *Lemon*, 403 U.S. at 612). The majority contends that the purpose of the statute at issue is "to provide Hawaiians with another holiday." Slip op. at 10873. This is undeniably a secular purpose; however, it constitutes an incomplete and highly misleading description of the purpose of the Hawaii statute.

Further, the majority assumes that a statute need only have *a* secular purpose. In fact, that is not enough. A careful analysis of the Supreme Court's decisions concerning the purpose prong of *Lemon* demonstrates the majority's error. As Justice O'Connor stated, in the course

of casting the crucial fifth vote, the purpose prong "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). If a principal purpose is to further religion, the statute is void.

That *any* secular purpose is insufficient under *Lemon* is clear from the fact that *every* statute can be described in such a way that it includes a secular purpose. For example, if a public school were to offer a course in which students were instructed to read the Bible not as literature but as the revealed word of God, it could be said that *a* purpose of the practice is to foster literacy. As a factual matter this might well be correct. The School Board may have decided that it is important for the students' minds that they read books, and that it is important for their immortal souls that one of the books they read be the Bible. Thus, the Bible-reading has a secular purpose (literacy) as well as a religious purpose. However, the secular purpose is wholly irrelevant to the real issue the court must determine. From a constitutional standpoint, the question is: having decided that students should read books, was there a legitimate secular purpose behind the *further* decision that the students should read the Bible? Similarly, if a state passed legislation requiring the erection at every other street corner of a pole containing a stop sign with the word "STOP" and a picture of Jesus Christ in the background, there is no doubt that a purpose of the statute would be to regulate the flow of traffic and require vehicles to stop. However, from a constitutional standpoint, the question that would have to be asked is: why the picture of Jesus Christ? Is the purpose of requiring the picture to be on the sign secular? In the

case before us, the question is: *having decided that Hawaiians should have another holiday, was there a legitimate secular purpose behind the legislature's further decision to select Good Friday as that holiday*? The majority in *Cammack* fails to ask that fundamental question.

To put it another way, what the majority should have recognized is that the purpose of a law selecting a particular day for an additional holiday necessarily includes the purpose behind the selection of that particular day. That the Hawaii legislature wanted to create another holiday is an incomplete description both of the statute and of its purpose. In determining statutory purpose, we must consider all essential elements of the statute, not just those of secular origin. A full and fair description of the Hawaii statute leads to the inexorable conclusion that a primary purpose underlying its enactment was to foster the observance of religion; accordingly, the statute fails the first prong of the *Lemon* test.

Although the majority fails to ask the right question, – why Good Friday? – it does provide what appears to be its answer to that inquiry. The opinion argues that the decision to select Good Friday was in fact motivated by calendar concerns, i.e., that Good Friday happened to be a convenient date for another holiday. Remarkably, as support for this conclusion, the majority cites the legislative history, which states clearly that the supporters of the bill that made Good Friday a legal holiday believed that Good Friday, as "a day of solemn religious observance by the members of the various churches and religious denominations[,] should be given legal sanction." Slip op. at 10869-70. The opinion in fact points to no evidence that calendar concerns motivated the selection

of Good Friday as a legal holiday, *see* Slip op. at 10885-87 (Nelson, D.W., dissenting). Indeed, it would be difficult to imagine a *less* appropriate holiday to select on the basis of "calendar" concerns, since Good Friday does not occur on a fixed date or even in the same month each year. Rather, it is defined – pursuant to ecclesiastical law – as the Friday preceding the first Sunday after the first full moon after the vernal equinox. *Random House College Dictionary* 416, 568 (rev. ed. 1980).

The majority also suggests that the purpose of selecting Good Friday as an official holiday was to accommodate the religious needs of many of its people. It is worth noting that this suggestion further belies the notion that Good Friday was merely a convenient date for a holiday. Moreover, the justification fails on its own terms. In the context of the Court's Establishment Clause jurisprudence, accommodation of religion means the lifting of government-imposed burdens on the free exercise of religion. *See, e.g., Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 144-45 (1987). If the statute at issue required that state and local employees who wished to celebrate Good Friday be *permitted* not to work on that day, then it could be characterized as accommodation. However, it *mandates* that the government close down. This is not accommodation, but establishment.

II

ENDORSEMENT

A statute which signifies official endorsement of religion violates the effects prong of *Lemon, Lynch,* 465 U.S. at 692 (O'Connor., J., concurring). The focus of the inquiry is

on the message the statute communicates. Here, that message is unmistakable. Good Friday is a wholly sectarian holiday. By contrast with Sunday, Thanksgiving, and Christmas – each of which has come to have secular significance – there is no recognizable secular tradition surrounding Good Friday. While non-believers may associate Sundays with recreation, Thanksgiving with eating turkey, and Christmas with sending and receiving gifts and greeting cards, one is hard-pressed to come up with any analogous practices associated with Good Friday. Good Friday connotes the Crucifixion – and nothing else.

Two state courts have considered the argument that Good Friday, like Sunday, Thanksgiving and Christmas, has developed into a secular holiday. Both squarely rejected this contention. As the Connecticut Supreme Court stated, "the passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins." *Griswold Inn, Inc. v. Connecticut*, 183 Conn. 552, 441 A.2d 16, 21 (1981). In striking down an official Good Friday holiday, the California Court of Appeal agreed, observing that "there is no evidence in the present case that the Christian holy day of Good Friday has become secularized in any degree during the course of its longtime observance by Christian sects." *Mandel v. Hodges*, 54 Cal. App. 3d 596, 612, 127 Cal. Rptr. 244, 254 (1976). While no federal court has directly faced the question presented by this case,[3] every state court to

---

[3] In the context of an Establishment Clause challenge to a different practice, one district court has remarked that Good Friday should be classified among those "holidays with a

(Continued on following page)

have considered an Establishment Clause challenge to state actions investing Good Friday with legal significance has found a constitutional violation. *See id.* (invalidating executive order granting three hours of paid leave for state employees on Good Friday); *Griswold Inn* (invalidating prohibition of liquor sales on Good Friday); *Samuels v. Oberly*, No. 83M-JN-16 (Del. Super. Ct. February 7, 1984) (unpublished opinion) (same).[4]

(Continued from previous page)

purely religious significance." *Florey v. Sioux Falls School Dist.*, 464 F. Supp. 911, 915 (D.S.D. 1979), *affirmed by* 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

[4] Some state courts have upheld terms in collective bargaining agreements making Good Friday a holiday, not on the theory that Good Friday is a secular holiday but because, in the view of those courts, the designation of the day as a holiday was not attributable to state action. *See California School Employees Ass'n v. Sequoia Union High School Dist.*, 67 Cal. App. 3d 157, 136 Cal. Rptr. 594 (1977); *Americans United for Separation of Church and State v. Kent County*, 97 Mich. App. 72, 293 N.W.2d 723 (1980). In addition, one federal district court has upheld a Good Friday holiday that was the result of a negotiated contract with a labor union. *See Franks v. Niles*, 29 Fair. Empl. Prac. Cas. (BNA) 1114, 30 Empl. Prac. Dec. (CCH) 33,297 (N.D. Ohio 1982). In the case before us, the unions argue that even if we were to reverse the majority's decision with respect to the statutory Good Friday holiday, our decision would have little practical effect because much of what the statute accomplishes is duplicated in collective bargaining agreements.

The Supreme Court's most recent opinion concerning state action seriously undermines the decisions holding that a state's agreement to a term in a contract does not constitute state action. *Edmonson v. Leesville Concrete Co., Inc.*, 59 U.S.L.W. 4574, 4576 (1991), holds that a judge's role in supervising the exercise of peremptory challenges by private litigants constitutes

(Continued on following page)

The majority attempts to show that non-believing Hawaiians have come to view Good Friday as a popular shopping day. That may well be true. People tend to shop on holidays when stores remain open. However, whatever incidental association of Good Friday with shopping may exist falls far short of the sort of independent secular tradition that justifies Sunday, Thanksgiving and Christmas holidays. *See Lynch*, 465 U.S. at 685 ("That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not . . . determine the character of the display."). Even the majority recognizes that the Good Friday holiday cannot be justified on the basis of long tradition. *See* slip op. at 10863 (distinguishing *March v. Chambers*, 463 U.S. 783, 786 (1983), which upheld Nebraska's practice of opening the state legislature's sessions with a prayer on the basis of a "deeply embedded" historical tradition). Thus, the Sunday, Thanksgiving, and Christmas analogies are inapplicable, even under the majority's analysis.

As Justice Holmes told us, the life of the law has been "experience." I doubt that there is a person among us

---

(Continued from previous page)

"significant participation of the government," and therefore justifies a finding of state action. It appears to follow *a fortiori* that a state's *agreement* to a term in a contract is also state action.

In any event, in the present case, the majority did not rest its decision on the basis of any supposed absence of state action. Rather, it recognized that Hawaii's statutory designation of Good Friday as a public holiday was state action, but found that action consistent with the Establishment Clause.

who is good conscience could say that Good Friday has taken on the same type of secular meaning, commonality, and acceptability as Sunday, Thanksgiving, or Christmas. In fact, there can be no doubt that Good Friday is a solemn religious occasion, pure and simple, and marks one of the holiest moments of a particular religious faith. That is the occasion which Hawaii has chosen to consecrate and on which it has placed the official endorsement of the state.

III

At one time in our nation's history, laws making Sunday and Christmas official holidays had purely religious purposes and effects. Had someone challenged such laws under the Establishment Clause during the infancy of the Republic, and had the Supreme Court of that era applied our modern jurisprudence, the laws might well have been struck down and the secular traditions never developed. However, such challenges were not brought and the secular traditions did develop. As the majority recognizes, we must interpret the Establishment Clause in light of that reality. *See McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (noting the irrelevance of the religious origins of a Sunday closing law where Sunday had taken on secular significance). Yet the majority fails to recognize a necessary corollary of the *McGowan* principle. Where, as here, no independent secular tradition yet exists, the law cannot be justified on the basis of the hypothesis that such a tradition might eventually develop.

In any event, it is difficult to imagine that those to whom Good Friday is a sacred day would particularly relish the prospect of its coming to be known as a public holiday like any other – i.e., as a day commemorated largely by sporting events and appliance sales. Indeed, the Establishment Clause serves in part to protect the religious realm from the secular. *See* L. Tribe, *American Constitutional Law*, 1171 & n.14 (2d ed. 1988) (discussing, *inter alia*, the views of Roger Williams). Distorting the First Amendment in order to allow a state to make a religious occasion an official holiday benefits no one, not even those who hold Good Friday sacred.

In the opinion we refuse to reconsider, the majority makes a number of additional errors, each of which is ably discussed in Judge D.W. Nelson's excellent dissenting opinion. I shall not repeat that discussion here. I simply close by noting that today we not only condone the abandonment of sound constitutional principles of long-standing duration, but we take one further step down the path of majoritarian control of the lives and beliefs of all our citizens.[5]

---

[5] Almost fifty years ago, Justice Jackson wrote that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Though time may have made these words trite, it surely has not made them any less true.

PREGERSON, Circuit Judge,dissenting from the denial of rehearing en banc.

I join in Judge Reinhardt's compelling dissent from the denial of rehearing en banc. We all need to bear in mind the wise words of Mr. Justice Black: "[T]he only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide." *Board of Educ. of Cent. School Dist. No. 1 v. Allen*, 392 U.S. 236, 254 (1968) (Black, J., dissenting).

KOZINSKI, Circuit Judge, dissenting from the denial of rehearing en banc.

The three carefully crafted opinions in this case illustrate well the shortcomings of the *Lemon* test. In any event, I believe that Judge Reinhardt's dissent raises concerns of sufficient magnitude to warrant en banc consideration of this important case of first impression.

APPENDIX D

Hawaii Revised Statutes section 8-1 provides:

§ 8-1 Holidays designated. The following days of each year are set apart and established as state holidays:

The first day in January, New Year's Day;

The third Monday in January, Dr. Martin Luther King, Jr., Day;

The third Monday in February, Presidents' Day;

The twenty-sixth day in March, Prince Jonah Kuhio Kalanianaole Day;

The Friday preceding Easter Sunday, Good Friday;

The last Monday in May, Memorial Day;

The eleventh day in June, King Kamehameha I Day;

The fourth day in July, Independence Day;

The third Friday in August, Admission Day;

The first Monday in September, Labor Day;

The eleventh day in November, Veterans' Day;

The fourth Thursday in November, Thanksgiving Day;

The twenty-fifth day in December, Christmas Day;

All election days, except primary and special election days, in the county wherein the election is held;

Any day designated by proclamation by the President of the United States or by the governor as a holiday.

(2)

No. 91-796

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, *et al.*,

Petitioners,

vs.

JOHN WAIHEE, *Governor of Hawaii, et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

GOVERNMENT RESPONDENTS' BRIEF IN OPPOSITION

RONALD B. MUN*
Corporation Counsel
City and County of Honolulu
KARL K. ICHIDA
Deputy Corporation Counsel
City and County of Honolulu
Honolulu Hale
Honolulu, Hawaii 96813
(808) 523-4832
Counsel for Respondents Mayor, Managing Director, and Director of Civil Service, City and County of Honolulu ("City and County Respondents")

**Counsel of Record for City and County Respondents*

WARREN PRICE, III
Attorney General
State of Hawaii
STEVEN S. MICHAELS**
Deputy Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Counsel for Respondents Governor of Hawaii and Director of Personal Services, State of Hawaii ("State of Hawaii Respondents")

***Counsel of Record for State of Hawaii Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether any Petitioner has Article III or prudential standing to challenge Hawaii's adoption of Good Friday as a "state holiday" or, if so, whether standing, if any, exists only to attack payment of holiday pay and other benefits under collective bargaining agreements making Good Friday a holiday independent of any statute adopting Good Friday as a holiday?

2. Whether, to the extent standing exists, Hawaii's Good Friday holiday is sustainable without resort to the purpose or effects prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in light of the history of public adjournments on Good Friday, and the rationale of *Marsh v. Chambers*, 463 U.S. 783 (1983)?

3. Whether, in the face of the consistent decisions of the District Court and the Court of Appeals upholding Hawaii's Good Friday holiday as properly motivated by secular purposes, it would be appropriate for this Court to rule that the purpose prong of the *Lemon* test for Establishment Clause challenges has been violated, and, therefore, the holiday is unconstitutional?

4. Whether, despite the availability of the Friday before Easter as a full, uniform day of rest for all public workers in Hawaii, regardless of their religious beliefs, and the neutral availability of any other public dispensations on Good Friday (i.e., tolling of court and other deadlines), it would be proper for this Court to strike down Hawaii's Good Friday holiday on the ground that

QUESTIONS PRESENTED – Continued

the holiday wrongly advances religion in violation of the "effects" prong of this Court's *Lemon* test?*

---

* Should certiorari be granted, the Government Respondents would pose four additional questions for review by the Court.

5. Whether the notice of appeal here is insufficient, in light of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), to have conferred authority on the court of appeals to rule on claims by petitioners Lucas, Root, Stapleton, and Wallace, and, if so, whether the control exercised by petitioner Cammack over the litigation by her co-petitioners renders her in privity with these parties and her claim here barred by res judicata?

6. Whether, before reaching the merits of Petitioners' claims, this Court should first certify questions to the Supreme Court of Hawaii under its Appellate Rule 13 requesting answers as to whether Hawaii's Good Friday holiday, including provisions of collective bargaining agreements making Good Friday a paid holiday, are invalid in light of the Hawaii Constitution, or Chapter 89, Haw. Rev. Stat. (1985), governing public employment?

7. Whether, if the summary judgments entered in favor of Respondents should not be affirmed, this Court should nonetheless refuse to direct a judgment for Petitioners in light of the existence of issues of material fact and the number of persons and complexity of contractual arrangements that are affected?

8. Whether, if application of *Lemon*'s purpose and effects analyses leave a substantial question here, this case should be the vehicle for overruling or clarifying *Lemon*?

PARTIES BEFORE THIS COURT

The Government Respondents are all named defendants in the District Court and officials of the State of Hawaii or the City and County of Honolulu who are sued in their official capacities only. As named in the District Court, the Government Respondents include: John Waihee, Governor, State of Hawaii, Alfred Lardizabal, Director of Personnel Services, State of Hawaii, Frank F. Fasi, Mayor, City and County of Honolulu, Jeremy Harris, Managing Director, City and County of Honolulu, and Loretta K. Fukuda, Director of Civil Service, City and County of Honolulu. In 1991, Mr. Lardizabal left government service and has been succeeded by Sharon Y. Miyashiro. In 1991, Ms. Fukuda also retired and was succeeded by Mr. James T. Sato.

The private Respondents in this case are the five public employee unions which maintain collective bargaining agreements under Chapter 89, Haw. Rev. Stat., with the State of Hawaii or the City and County of Honolulu, or both. All were named as defendants in the District Court, and include: Hawaii Government Employees' Association, Local 152, AFSCME; the Hawaii State Teachers Association; the University of Hawaii Professional Assembly; the Hawaii Fire Fighters Association, Local 1463, IAFF; and the State of Hawaii Organization of Police Officers.

PARTIES BEFORE THIS COURT – Continued

Petitioners Nell A. Cammack, Genie Lucas, Douglas Paul Root, Carolyn L. Stapleton, and Michele Wallace, at the time the complaint was filed, were residents of the State of Hawaii, and taxpayers of the state of Hawaii and of the City and County of Honolulu. At the time suit was commenced, Petitioner Cammack was an employee of the Department of Transportation, State of Hawaii; Petitioners Stapleton and Wallace were students at the William S. Richardson School of Law at the University of Hawaii at Manoa, on the Island of Oahu; Petitioner Root was an untenured faculty member at the University of Hawaii at Manoa; and Petitioner Lucas was a teacher at a private sectarian elementary and high school on the Island of Oahu. The present residence and occupation of each Petitioner is not presently stated in the petition for certiorari, or elsewhere in the record. The Government respondents do not dispute that Petitioner Cammack remains employed by the Hawaii Department of Transportation, and that Petitioner Stapleton is employed by the City & County.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BEFORE THIS COURT iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ORDERS, AND CONTRACTS INVOLVED 2

STATEMENT OF THE CASE 4

A. The Practice of Adjournment On Good Friday 5

B. Hawaii's Good Friday Holiday 6

C. Proceedings Below 12

REASONS FOR DENYING THE WRIT 15

I. Petitioners Do Not Have Article III or Prudential Standing, or, if They Have Any Standing, it is Only to Challenge the Collective Bargaining Agreements, the Merits of Which are not Even Addressed by the Petition; Accordingly, This Court Should Deny the Writ of Review 16

II. Review Should Be Denied on the Basis that the Mere Public Adjournment on Good Friday, Which Traces its Pedigree Back to the Origins of this Nation, is Valid Under the Principles of *Marsh v. Chambers*, 463 U.S. 783 (1983), and, Thus, Granting Review Would Not Likely Reach Petitioners' Issues 19

TABLE OF CONTENTS – Continued

Page

III. Even if *Lemon v. Kurtzman*, applies to Good Friday Holidays Generally, it Would Be Inappropriate to Grant Review to Examine Petitioners' "Purpose" Arguments Under the *"Lemon"* Test. 21

IV. The Petition's Contention that Adoption of a Good Friday Holiday, as in Hawaii, Violates *Lemon*'s Proscription on Improper Effect of Advancing Religion Misconstrues the Law and the Record, and is no Basis for Review 26

V. Even if the Questions Presented in the Petition are Jurisdictionally Substantial, the Absence of any Conflict in the Lower Appellate Courts, and the Number of Jurisdictions that May be Affected by a Precipitous Grant of Review in this Court, Warrants Denial of Review and Further Litigation 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Wright, 468 U.S. 737 (1984) ..... i, 12, 19

Americans United for Separation of Church and State v. County of Kent, 97 Mich. App. 72, 293 N.W. 2d 723 (1983) ..... i, 5, 12, 19, 20

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 18

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 17

Bowen v. Kendrick, 487 U.S. 589 (1988) 17, 22, 27

California School Employment Ass'n v. Sequoia Union High School, 67 Cal. App. 3d 157, 136 Cal. Rptr. 594 (1977) 6

Cammack v. Waihee, 673 F. Supp. 1524 (D. Haw. 1987) 7, 12, 13

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) 14

County of Allegheny v. ACLU, 57 U.S.L.W. 3564 (U.S. Feb. 28, 1989) 15

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 20, 24, 25, 27, 28

Doremus v. Board of Education, 342 U.S. 429 (1952) 18

Edwards v. Aguillard, 482 U.S. 578 (1987) 22

Employment Division v. Smith, 110 S. Ct. 1595 (1990) 25

Franks v. Niles, 30 Empl. Prac. Dec. ¶ 33 (N.D. Ohio 1982) 6

Freedom from Religion v. Zielke, 845 F.2d 1463 (7th Cir. 1988) 17

TABLE OF AUTHORITIES – Continued

Page

Grand Rapids School District v. Ball, 473 U.S. 373 (1985) 17

Griswold Inn, Inc. v. State, 183 Conn. 552, 441 A.2d 16 (1981) 27, 29

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... i, 12, 13, 19, 21-22

Lynch v. Donnelly, 465 U.S. 668 (1984) 13, 26, 28

Lyng v. Northwest Indian Cemetary Protective Association, 485 U.S. 439 (1988) 25, 28

Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) 13, 27

Marsh v. Chambers, 463 U.S. 783 (1983) .. i, 5, 12, 19, 20

McGowan v. Maryland, 366 U.S. 420 (1961) 10, 26-27

Minority Employees v. Tennessee Dep't of Employment Security, 901 F.2d 1327 (6th Cir. 1990) 16

Montana v. United States, 440 U.S. 147 (1979) 16

Mueller v. Allen, 463 U.S. 388 (1983) 22

Saladin v. City of Milledgeville, 812 F.2d 687 (11th Cir. 1987) 19

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 36 (1976) 19

Taub v. Commonwealth of Kentucky, 842 F.2d 912 (6th Cir. 1988) 17

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) . ii, 15

Vohlers v. E.H. Stafford Mfg. Co., 171 Mich. 8, 137 N.W. 127 (1912) 5

TABLE OF AUTHORITIES – Continued

Page

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) 19

Wallace v. Jaffree, 472 U.S. 38 (1985) 13, 23

Witters v. Washington Dep't of Services, 474 U.S. 481 (1986) 38

Zorach v. Clausen, 343 U.S. 30 (1952) 25

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

Haw. Rev. Stat., Chapters 76-88 (1985) 10

Haw. Rev. Stat., Chapters 78-89 (1985) 3

Haw. Rev. Stat., Chapter 89 (1985) .....ii, iv

Haw. Rev. Stat. § 1-29 (1985) 10

Haw. Rev. Stat. § 8-1 (1985) 2, 10, 11, 13-14, 18

Haw. Rev. Stat. § 80-1 (1985) 10

Haw. Rev. Stat. § 89-9 (1985) 10

LEGISLATIVE HISTORY:

Act of June 13, 1896, ch. 66, §1, Laws of the Republic of Hawaii 247 .....2, 6

Act of April 28, 1903, ch. 55, §1, 1903 Haw. Sess. L. 278 .....2, 6

TABLE OF AUTHORITIES – Continued

Page

Act of March 23, 1915, ch. 20, §1, 1915 Haw. Sess. L. 64 ..... 2, 6-7

Act of April 8, 1919, ch. 54, §1, 1919 Haw. Sess. L. 64 ..... 2, 7

Act of April 30, 1941, ch. 1, §1, 1941 Haw. Sess. L. 1-2 2

Governor's Veto Message dates May 2, 1939 9

1937 Haw. H.J. 2359 7

1941 Haw. H.J. 260 9

Haw. Conf. Comm. Rep. No. 2-41, reprinted in 1941 Haw. Sen. J. 875 9

Haw. H. Stand. Comm. Rep. No. 179-41, reprinted in 1941 Haw. H.J. 899 9

1939 H. Stand. Comm. Rep. No. 254-39, reprinted in 1939 Haw. H.J. 890 8

Haw. Sen. Comm. Rep. No. 225-29, reprinted in 1929 Haw. Sen J. 727 7

Haw. Sen. Stand Comm. Rep. No. 239-31, reprinted in 1931 Haw. Sen. J. 803 7

Haw. Sen. Stand Comm. Rep. No. 282, reprinted in 1939 Haw. Sen. J. 1063 7

Haw. Sen. Stand Comm. Rep. No. 296-41, reprinted in 1941 Haw. Sen. J. 719 9

1 Annals of Congress 17 ..... 5, 20

1 Annals of Congress 116 (April 19, 1789 (House)) 3

TABLE OF AUTHORITIES – Continued

Page

1 Annals of Congress 1519 (April 2, 1790 (House)) 3

1 Annals of Congress 17 (April 10, 1789 (Senate)) 3

Annals of Congress 18 (Senate) 5

Annals of Congress 961 (April 2, 1790 (Senate)) 3

133 Cong. Rec. S18600 (Dec. 21, 1987) 5

134 Cong. Rec. S3147 (Mar. 28, 1988) 6

COURT RULES:

Fed. R. App. P. 3(c) 15

Fed. R. App. P. 26 10

OTHER AUTHORITIES:

Honolulu Star-Bulletin at 1, June 7, 1941 (C.R. 50 at 4) 9

Restatement (Second of Judgments § 39 (1982)) 16

No. 91-796

In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, *et al.*,

Petitioners,

vs.

JOHN WAIHEE, *Governor of Hawaii, et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

GOVERNMENT RESPONDENTS' BRIEF IN OPPOSITION

Respondents Governor of Hawaii, Director of Personnel Services, State of Hawaii, and the Mayor, Managing Director, and Director of Civil Service of the City and County of Honolulu (hereinafter "Government Respondents"), pray that the petition for review of the judgment of the United States Court of Appeals for the Ninth Circuit, entered April 30, 1991, be denied.

JURISDICTION

The judgment of the court of appeals was entered April 30, 1991, and a petition for rehearing and suggestion

for rehearing *en banc* was denied August 13, 1991. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was invoked pursuant to 28 U.S.C. § 1291, and the sufficiency of the notice of appeal (Resp. App. "A") is briefed *infra* pp. 15-16. Jurisdiction in the district court was alleged under 28 U.S.C. §§ 1331 and 1343, and the issue of Petitioners' standing in that court is briefed *infra* pp. 16-19.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ORDERS AND CONTRACTS INVOLVED

The First Amendment to the Constitution provides in part that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment to the Constitution provides in part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]

The Act of June 13, 1896, ch. 66, § 1, Laws of the Republic of Hawaii 247; the Act of April 28, 1903, ch. 55, § 1, 1903 Haw. Sess. L. 278; the Act of March 23, 1915, ch. 20, § 1, 1915 Haw. Sess. L. 19-20; the Act of April 8, 1919, ch. 54, § 1, 1919 Haw. Sess. L. 64; and the Act of April 30, 1941, ch. 1, § 1, 1941 Haw. Sess. L. 1-2, are printed in the attached appendix "B." Haw. Rev. Stat. § 8-1 in its present form is reprinted in Pet. App. 122. Relevant and representative parts of the collective bargaining agreements at issue are printed in appendix "C." Statutes of California,

Connecticut, Delaware, Florida, Indiana, Louisiana, Maryland, New Jersey, New Mexico, North Carolina, North Dakota, Tennessee, and Wisconsin, recognizing a Good Friday holiday are referenced at Pet. App. 11 n.2.[1] The First Congress's orders recognizing Good Friday are reported at 1 *Annals of Congress* 17 (April 10, 1789 (Senate)); *id.* at 116 (April 10, 1789 (House)); *id.* 961 (April 2, 1790 (Senate)); *id.* 1519 (April 2, 1790 (House)). Parts of Hawaii's public employment laws, Haw. Rev. Stat. Chs. 78-89, which are most relevant to the disposition of the petition are printed in appendix "D."

---

[1] A survey by the Department of the Attorney General, State of Hawaii, has determined that, of the largest 100 cities in the United States, twenty-five, including Honolulu, appear to observe or to have recently observed Good Friday pursuant to local ordinance, or collective bargaining agreement irrespective of state statute. These cities include: Chicago, Illinois; Philadelphia, Pennsylvania; Baltimore, Maryland; Indianapolis, Indiana; Memphis, Tennessee; New Orleans, Louisiana; Milwaukee, Wisconsin; Cleveland, Ohio; Pittsburgh, Pennsylvania; Minneapolis, Minnesota; Buffalo, New York; Birmingham, Alabama; Arlington, Texas; Baton Rouge, Louisiana; Rochester, New York; Shreveport, Louisiana; Lubbock, Texas; Greensboro, North Carolina; Madison, Wisconsin; Knoxville, Tennessee; Raleigh, North Carolina; Fort Wayne, Indiana; Dayton, Ohio; and Chattanooga, Tennessee. The collective bargaining agreements and ordinances supporting this factual statement do not appear in the record, but will be made available to the Petitioners for their inspection, or to the Court should it so request. Should certiorari be granted, Respondents would ask the court to take judicial notice of these materials, and would lodge appropriate copies of these materials with the Court.

STATEMENT OF THE CASE

This case arises out of arrangements in the Territory, and now State of Hawaii, whereby public workers have been granted a holiday the Friday before Easter, known commonly as Good Friday.

This practice, by which workers are given a day off or overtime, some government buildings are closed, and some services reduced, is unaccompanied by any expectation, threat, or suggestion that any one need use the day off to attend services. No religious symbols are placed on public property. No prayers or services in observance of Good Friday are sponsored by the State. Theaters, discotheques, stores, restaurants, and bars – from Kauai to Kona – remain open without sanction. Indeed, since at least 1972 the holiday has been the result not of the 1941 statute which first "set aside" Good Friday as a holiday, but of collective bargaining agreements with Hawaii's public labor unions. The contracts cover two thirds of the public work force, mandate a holiday irrespective of state law, and, accordingly to the undisputed facts, "[a]s a practical matter," dictate "similar holidays for employees not covered by the bargaining agreements."[2] In November of 1987, the federal district court held on these facts that the Constitution does not force the State and its municipalities to call off the three-day Easter weekend. In 1991, the Ninth Circuit affirmed. The issue here is whether these rulings should be overturned.

---

[2] Aff. of Kazuo ("Lefty") Yamamoto, Chief, Labor Relations Division, Dep't of Personnel Services, at ¶ 12 (C.R. 29 at 13).

A. The Practice of Adjournment on Good Friday.

As shown by Justice Frankfurter's scholarly concurrence in *McGowan v. Maryland*, 366 U.S. 420, 459 (1961), public adjournments on Good Friday trace back at least to the statute of Henry VI mandating that "all fairs and markets should cease to show forth goods or merchandise on Sundays, Good Friday, and the principal feast days." *Id.* at 471 (quoting 27 Henry VI, ch.5). Good Friday, like Sunday and Christmas, thereafter became "a part of the [secular] life of the English people." *Id.* at 477; *see Vohlers v. E.H. Stafford Mfg. Co.*, 171 Mich. 8, 137 N.W. 127, 129 (1912) (dictum) (quoting cases and rule for tolling of court deadlines on Christmas, Sunday, Good Friday).

In the First Congress, when the First Amendment was under debate, the Founders likewise took a leave on Good Friday. There was no protest. In the first session, after the votes for President were counted, the Senate met on April 7, 1789, "to take under consideration the manner of electing Chaplains," 1 *Annals of Cong.* 17, 18 (1834 ed.). Similar action was taken by the House three days later. *See Marsh v. Chambers*, 463 U.S. 783, 788 (1983). Both houses adjourned the next day, Good Friday. 1 *Annals of Cong.* 18 (Senate); *id.* at 116 (House). In 1790, despite rancor over earlier resolutions urging a day "of public . . . prayer" upon the submission of the Bill of Rights to the States, *id.* at 914, 915, there was no protest when, as the First Amendment was being considered by the States, the Senate took leave on April 2, and, in the House, as stated in its journal, it "Being Good Friday, the members adjourned without doing any business." *Id.* at 1519. Congress has continued to recognize Good Friday (*see* 133 Cong. Rec. S18600 (Dec. 21, 1987) (remarks of Sen. Byrd);

134 Cong. Rec. S3147 (Mar. 28, 1988) (same)), and at least a dozen other States formally recognize Good Friday by statute or judicial decision. *See* Pet. App. 11 n.2. Numerous localities recognize Good Friday by bargaining agreement or ordinance. *Supra* note 1; *See also Franks v. Niles*, 30 Empl. Prac. Dec. ¶ 33,297 (N.D. Ohio 1982); *Americans United for Separation of Church and State v. County of Kent*, 97 Mich. App. 72, 293 N.W. 2d 723 (1983); *California School Employment Ass'n v. Sequoia Union High School*, 67 Cal. App. 3d 157, 136 Cal. Rptr. 594 (1977).

B. Hawaii's Good Friday Holiday

The codification of Good Friday in Hawaii fits within the recognitions of Good Friday by other jurisdictions, which appear on their face to be without sectarian purpose. Indeed, Good Friday was adopted in the then-Territory of Hawaii more than fifty years ago as a result of the conflict between management and labor in the plantation economy that characterized Hawaii at the time.

The battle for more holidays in Hawaii began in the 1920s. The first holiday statute in Hawaii, Act of June 13, 1896, ch. 66, § 1, Laws of the Republic of Hawaii 247, recognized New Year's day, July 4th, Thanksgiving (November 28), and Christmas (December 25), as well as January 17 (the day the monarchy was toppled), June 11 (King Kamehameha's birthday), and the third Saturday in September. After annexation in 1898, January 17 was deleted, and Washington's birthday, Memorial Day (May 30) and Labor Day (September 1) were added, *see* the Act of April 28, 1903, ch. 55, § 1, 1915 Haw. Sess. L. 278. The Act of March 23, 1915, ch. 20, § 1, 1915 Haw. Sess. L.

19-20, added primary and general elections days, and, by the Act of April 8, 1919, ch. 54, § 1, 1919 Haw. Sess. L. 64, the Legislature added Armistice Day, then known as "Victory Day." At that time, and until the Legislature acted in 1941, Hawaii had no holidays between Washington's birthday (February 22) and Memorial Day (May 30), a gap of 97 days (98 days in leap years), far longer than any other gap in the schedule. *See* 676 F. Supp. at 1534.

Debates in the 1920s and 30s over adopting a Good Friday holiday revolved about the economics of doing so. In 1929, the Senate rejected a bill "to have Good Friday declared a legal holiday" because it "believe[d] that there are already enough legal holidays." Haw. Sen. Stand. Comm. Rep. No. 225-29, *reprinted in* 1929 Haw. Sen. J. 727. In 1931, the Senate again "s[aw] no good reason for adding to the number of Territorial holidays." Haw. Sen. Stand. Comm. Rep. 239-31, *reprinted in* 1931 Haw. Sen. J. 803; *see also* 1937 Haw. H.J. 2359.

In 1939, the Legislature passed a bill that, if enacted, would have "ma[d]e Good Friday a holiday." Haw. Sen. Stand. Comm. Rep. No. 282, *reprinted in* 1939 Haw. Sen. J. 1063. The accompanving House committee report makes clear, however, that legislators were not as concerned with promotion of religion so much as assuring a Good Friday holiday made economic sense.

> *There are now ten legal holidays in the Territory,* including Thanksgiving, plus primary and general election days. Public sentiment is divided on the advisability of creating Good Friday a legal holiday. *Some feel that we already have too many holidays to the detriment of both private and public business.* On the other hand, *others feel* equally strongly that Good Friday being *in theory* at least a day of solemn religious observance

> by the members of the various churches and religious denominations should be given legal sanction. More and more churches are now conducting the three-hour service on that day and *many business houses are allowing their employees to take time off* for this purpose. If the legislature should feel that we should have more legal holidays than we now have, it would seem that in view of the religious significance of Good Friday *observance of this day would have as much justification as Thanksgiving or Christmas.*

1939 H. Stand. Comm. Rep. No. 254-39, *reprinted in* 1939 Haw. H.J. 890 (emphasis added). In context, the committee's reference to church-going was intended to blunt business claims that this was a holiday the public could not afford, for if businesses survived in the private sector by taking off Good Friday, it would not hurt the public fisc unduly to follow suit. Indeed, such statements well express concern over the government's ability to retain its workforce (or function well) if more attractive holiday schedules were available in the private sector. Likewise, the committee's remarks reflect appreciation of the fact that adopting the business policy of granting some time off would dampen upward pressure on private labor demands that come in the wake of extending holiday benefits to public employees. Characterizing Good Friday as akin to long-accepted holidays, the committee thus emphasized that a Good Friday holiday would have "as much" justification as Christmas day.

Indeed, opponents of the 1939 bill fought the measure solely on economic grounds. Established business interests believed that most public workers would *not* attend services, and would go shopping to the detriment

of those businesses that would not be open on Good Friday. As the Chamber of Commerce said, "[t]his addition of another legal holiday each year would be satisfactory to our body, if it were felt that all merchants of the city would close, but as we have seen from experience on other legal holidays, this would definitely not be the case." Letter from John A. Hamilton, Chamber of Commerce of Honolulu, to Governor Joseph B. Poindexter dated April 24, 1939, Clerk's Record ("C.R.") 47. The Governor vetoed the measure, stating "I see no reason for adding to [the holidays] which we now have." Governor's Veto Message dated May 2, 1939, C.R. 47.

In the 1941 session, the matter was taken up again, and concerns focused even more clearly on economic impact. The House added Lincoln's birthday and good Friday, *see* 1941 Haw. H.J. 260; Haw. H. Stand. Comm. Rep. No. 179-41, *reprinted in* 1941 Haw. H.J. 899, a plan that the Senate rejected on the ground that, "inasmuch as Washington's Birthday is a legal holiday and falls within the short month of February, to have another holiday within that month would be inadvisable." Haw. Sen. Stand. Comm. Rep. No. 296-41, *reprinted in* 1941 Haw. Sen. J. 719. This view, over a dissent, fell in conference to the House position that more, not fewer, holidays were needed. Haw. Conf. Comm. Rep. No. 2-41, *reprinted in* 1941 Haw. Sen. J. 875. But, indeed, even the Senate view was that Good Friday was "advisable" because there was no "other holiday" nearby. The Governor, echoing his 1939 message, refused to endorse the bill, stating "the holidays were getting a bit thick about that time of year." *Honolulu Star-Bulletin* at 1, June 7, 1941 (C.R. 47 at 4). The bill thus became law without his signature.

Section 8-1, Haw. Rev. Stat., and its predecessors, on their face say nothing about what it means for days to be "set apart and established as state holidays," and, prior to 1971, the working conditions of the State's civil service and exempted personnel were governed by a series of statutes and executive orders. Haw. Rev. Stat. ch. 76-88.[3] With the advent of public employee collective bargaining in 1970, this changed.

Under Haw. Rev. Stat. § 89-9, public employers and exclusive representatives (unions) are under a duty to "meet at reasonable times," "and shall negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of employment[.]" Unions, because of their exclusive bargaining rights, must represent the interests of all employees in the unit "without discrimination" and "without regard to employee organization membership." *Id.* §§ 89-2, 89-8(a).

The thirteen collective bargaining units have thus freely chosen with their employers to designate Good Friday as a holiday under the collective bargaining agreements. The undisputed testimony below is that "no religious leaders or officials participate in or encourage, or are contacted by the bargaining teams in connection with the inclusion of the Friday before Easter as a holiday in the collective bargaining agreements" and the purpose of including Good Friday "has never . . . [been] to facilitate religious worship or any single faith." Aff. of Kazuo

---

[3] *See, e.g.*, Haw. Rev. Stat. § 80-1 (1985) (hours of operation) (no mention of pay or holidays); other than those of Haw. Rev. Stat. § 1-29, which tolls legal deadlines as does Fed. R. App. p. 26, there are no mandated consequences for the private sector on state holidays. *See McGowan*, 366 U.S. at 554.

"Lefty" Yamamoto, Chief, Labor Relations Division, Department of Personal Services, dated July 9, 1987 at ¶ 4 ["Yamamoto Aff."]. Rather, the holiday, which generally maintains Hawaii's present schedule of about one holiday per month, is the most acceptable day off "between Prince Kuhio Day (March 26) and Memorial Day." *Id.* The union contracts thus embody Good Friday as a holiday irrespective of Haw. Rev. Stat. § 8-1. *See* Govt. Resp. App. "C." Even if § 8-1 were repealed, the more than 65 percent of public workers in the State workforce governed by contract would still have Good Friday off (in the Transportation Department, where Ms. Cammack works, the contract covers 96 percent of workers, (Yamamoto Aff. ¶ 7). And, "given the size of the labor force governed by collective bargaining," "inclusion of the Friday before Easter as a holiday in collective bargaining requires similar holidays for employees not covered by the bargaining agreements." *Id.* ¶ 11.

The record evidence, consisting of well over two thousand pages of depositions and exhibits, dispositively shows that, in practice, the Good Friday holiday, in Hawaii, does no more than create a three-day Easter weekend for our public workforce. Indeed, each of the Petitioners admitted the lack of any display of Christian symbology, such as a cross, or message, any public observance of the holiday, or any message or speech recognizing the holiday, or suggesting, in any way, that attendance at services was appropriate, expected, or to be rewarded. As Ms. Lucas aptly agreed, "the only thing that happens is that the state employees don't go to work and for that reason the buildings are closed and locked." Lucas Dep. at 33, lines 12-16 (C.R. 47). Business leaders

presented unrebutted testimony that Good Friday has become a day that consumers use to take their car for service (Declaration of Lex Brodie dated Oct. 14, 1987) (C.R. 63), or run other shopping errands (Declaration of Robert B. Robinson, Chamber of Commerce of Honolulu, dated Oct. 14, 1987) (C.R. 61). In fact, since so many Christians use the day *not* to attend services, most Christian churches in Hawaii hold evening Good Friday services (Stapleton Dep. at 42, 99); *see also* Decl. of Richard Kanayama, State Department of Land and Natural Resources (state parks) (C.R. 47); Letter from Hiram Kamaka, Department of Parks & Recreation, City and County of Honolulu, to Richard Wurdeman dated July 9, 1987 (city parks) (C.R. 23) (all attesting to increased use of public parks).

C. Proceedings Below.

Petitioners, at the time suit was filed, taxpayers of the City and County of Honolulu and the State of Hawaii, sought a declaration that both Hawaii's statutory codification of Good Friday and the collective bargaining contracts embodying Good Friday as a paid holiday violated the Establishment Clause. *See* C.R. 1. On cross-motions for summary judgment, the district court concluded that § 8-1 was constitutional, and, a fortiori, so were the contracts. *Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987). The district court rejected the claims that taxpayer standing was inapt (*id.* at 1527-28), and abstention was called for (*id.* at 1528-29), and upheld the law under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), not reaching the Government parties' claim that dismissal was required as well under *Marsh v. Chambers*, 463 U.S.

783 (1983), in light of the long history of adjournments on Good Friday. Applying *Lemon*'s "purpose" prong, Judge Kay followed *Wallace v. Jaffree*, 472 U.S. 38 (1985), and *Lynch v. Donnelly*, 465 U.S. 668 (1984), holding that a law is not invalid if it is only " 'motivated in part by a religious purpose,' " 673 F. Supp. at 1531 (quoting *Wallace*), and will survive if it has " 'a' clearly secular purpose" (*id.* at 1535 (quoting *Lynch*)). Section 8-1 survived in light of the abundant record expressing "the legislature's view that the Territory needed 'more' holidays" in the period "during early to mid-Spring," and, in contrast to *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976), "the fact that the *entire* day, rather than a three hour period which corresponds in length to the traditional religious service, is a legal holiday." 676 F. Supp. at 1534-35 (original emphasis). The court rejected Petitioners' challenge under *Lemon*'s "effects" prong, finding that, on undisputed evidence, that Good Friday has become "a traditional shopping day in Hawaii," and that, "because of the enactment of the Good Friday statute which creates a 'three day weekend' for many Hawaiians" "Hawaii's population is better poised to take advantage of the state's unique recreational opportunities." *Id.* at 1536. Acknowledging that it is just as likely that granting a uniform day of rest "for all [public] employees, regardless of their individual religious choices," *id.* at 1537, will result in business pressures that diminish daytime church attendance as it is likely that granting Good Friday parishoners time to attend church would increase it, the court found "there is simply no evidence that the enactment of Hawaii Rev. Stat. § 8-1 has advanced Christianity." *Id.* at 1536. Because, the court

held, "whether the people of Hawaii choose to spend the day at the beach or in their churches is an individual choice," *id.* at 1537, "the primary effect of the Good Friday statute is secular in nature." *Id.* The court also rejected Petitioner's "entanglement" claims and entered judgment for Defendants.

On December 4, 1987, three days after judgment entered in the district court, a notice of appeal was filed which used an abbreviated caption that referred only to "Nell A. Cammack, et al.," and stated in the body thereof that "Plaintiffs above-named hereby appeal to the U.S. Court of Appeals for the Ninth Circuit . . . " (C.R. 71; Govt Resp. App. "A"). Three and one half years after appeal was taken, the Ninth Circuit, in a 2-1 vote, affirmed, *Cammack v. Waihee*, 932 F.2d 765 (9th Cir.), finding "that the Hawaii statute has a legitimate, sincere secular purpose, specifically to provide Hawaiians with another holiday" (Pet. App. 38), and that Good Friday's "mere placement on the roll of public holidays" and the granting of "a paid leave day for all employees covered by the collective bargaining agreements" (*id.* at 43) did not generate improper effects.

The court's narrow ruling acknowledged, as the Government Respondents did not dispute, that "[i]f Hawaii went further toward celebrating the religious elements of Good Friday," then substantial Establishment Clause problems might arise (*id.* at 44). However, those improper endorsements were not present here. The full court, dividing 21-6, denied *en banc* review.

REASONS FOR DENYING THE WRIT

The instant petition is flawed procedurally, mistaken legally, misleading factually, and unpersuasive prudentially. For numerous reasons, this Court's resources should not be deployed to review the validity, under the Establishment Clause, of Hawaii's three-day Easter weekend for its public workers.[4]

---

[4] Indeed, the Petition here is puzzling in that it departs from the views of even advocates for the American Civil Liberties Union, who have virtually conceded in this Court that Good Friday holidays, such as those at issue here, present no substantial question. See the colloquy reported from *County of Allegheny v. ACLU*, 57 U.S.L.W. 3564 (U.S. Feb. 28, 1989):

> What do you do about Christmas? What about the federal government declaring Dec. 25 a holiday? [Justice] Scalia asked. That's fine, Litman replied, but you can't go from there to holding the Establishment Clause in abeyance for 45 days.
>
> What if Congress declared Good Friday a federal holiday? [Chief Justice] Rehnquist inquired. That's a harder question, Litman returned, but it might be justified as simply an acknowledgement that many people take that day off anyway.

In addition to this fact, it is dubious that Petitioners even properly appealed to the Ninth Circuit. As we argued below, the Notice of Appeal which purported to confer power on the court of appeals was fatally flawed in light of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1987). Here, as in *Torres*, Petitioners Lucas, Root, Stapleton, and Wallace, are mentioned specifically nowhere in the notice of appeal, and the use of "et al." in the caption of the notice, which was referred to in the notice's body, is insufficient to "provide such notice" as Fed. R. App. P. 3(c) requires. *Id.* at 318. The Ninth Circuit recognized

(Continued on following page)

I. Petitioners Do Not Have Article III or Prudential Standing, or, if They Have Any Standing, it is Only to Challenge the Collective Bargaining Agreements, The Merits of Which are Not Even Addressed by the Petition; Accordingly, This Court Should Deny the Writ of Review.

This Court, particularly in constitutional cases, has "strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant

---

(Continued from previous page)

that its analysis of *Torres* conflicted with the *en banc* decision of the Sixth Circuit in *Minority Employees v. Tennessee Dep't of Employment Security*, 901 F.2d 1327 (6th Cir. 1990), *see* Pet. App. 16, and, in an apparent effort to elude the conflict, held the notice was at least "sufficient to preserve [Petitioner Cammack's] appeal" (*id.* at 17 n.7). This, however, is not so. Aside from the fact that Cammack was mentioned nowhere in the body of the notice, Cammack was in privity with her co-plaintiffs in the trial court as a result of her unique role in organizing the lawsuit, contacting and arranging for counsel, and enlisting the other plaintiffs. *See* Cammack Dep. at 53-55; Wallace Dep. at 60-61. These facts were simply overlooked by the court of appeals, and nullify any Petitioner's right to seek review here. Because Ms. Cammack "control[led] or substantially participate[d] in the control of the presentation on behalf of [her co-plaintiffs,]" *Restatement (Second) of Judgments* § 39 (1982), she ought to have been bound by the district court judgments against her co-plaintiffs. *See, e.g., Montana v. United States*, 440 U.S. 147 (1979). This was simply not the case where a single counsel represented several Plaintiffs, each of whom simply acted to protect their own respective interests. The case was not ever properly "in" the court of appeals for purposes of 28 U.S.C. § 1254, or, to the extent it was, the Petition is still barred by *res judicata*.

facts." *Bender v. Williamsport Area School District*, 475 U.S. 534, 542 (1986). A critical set of reasons why certiorari should be denied is that Petitioners lack Article III and prudential standing to litigate the issues raised in the petition.

First, both courts below, in finding "taxpayer" standing present, overlooked that the taxpayer injuries claimed in this case are not related to powers of state and local governments analogous to those under the taxing and spending powers. *Cf. Grand Rapids School District v. Ball*, 473 U.S. 373, 380 n.5 (1985). " '[E]ven within an unitary court system,' " "the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.' " *Allen v. Wright*, 468 U.S. 737, 761 (1984). Although it is true that this Court will not find taxpayer standing absent "simply because the funding authorized by [the Legislature] has flowed through and been administered by [the Executive]," *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988), the payments made to public workers are not at their "heart a program of disbursement of funds" to the general public. *Id. See generally Taub v. Commonwealth of Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988); *but cf. Freedom from Religion v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988).

Second, Petitioners' *taxpayer* injury is not attributable to the fact that government businesses are *closed* on Good Friday; rather, the incremental cost of the holiday (overtime and holiday pay for some workers) is paid to keep essential government services *open* on a day the unions have voted to maintain as a holiday. Unlike most taxpayer standing cases challenging general welfare programs whose disbursements allegedly offend the

Establishment Clause, elimination of the challenged incremental public cost (overtime and holiday pay) will *magnify* the allegedly offensive government conduct (closure of government offices) because no employee will be obligated to come in on Good Friday under those circumstances. Thus, at its most basic level, there is no necessary connection between the monies spent and the "good faith pocketbook" injury claimed by Petitioners. *See, e.g., Doremus v. Board of Education*, 342 U.S. 429 (1952).

Third, along these lines, at the very least the connection between the monies spent and any actual concrete injury to the Petitioners is at least as speculative as that found by the four Justice opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), to be insufficient to support standing as a general matter, at least as to state expenditures. *See* Pet. App. at 20-21 & n.9. Here, as in *ASARCO*, there can be no guarantee that barring of overtime pay for Good Friday work would redound to any Petitioner.

Fourth and most important of all, however, even if none of the above is correct, Petitioners utterly lack *taxpayer* standing to challenge the *statutory* codification of Good Friday, as the effects that are independently traceable to Haw. Rev. Stat. § 8-1 (tolling of court deadlines) do not involve expenditure of *any* public funds. Rather, public funds are spent "on" Good Friday only as a result of the collective bargaining agreements and the collateral consequences of those agreements on uncovered workers. Nowhere does the Petition deal with this fact. Indeed, the Petition nowhere even argues how the Establishment Clause plausibly dictates nullification of the bargaining contracts – agreements that, historically, and logically,

have purposes and effects independent of any state statute. Put another way, nullification of the Hawaii statute would not make relief for Petitioners, as *taxpayers*, " 'likely.' " *Allen*, 468 U.S. at 751 (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 36, 38 (1976)). And, because Petitioners are not in any meaningful sense exposed to "unwelcome religious exercises" (or the like) under the present record of Good Friday adjournment in Hawaii, *see Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 487 n. 22 (1982); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987), they do not have standing to challenge the existence of a Good Friday holiday apart from any expenditure of funds. Accordingly, at the very least, none of the questions presented are those which Petitioners have standing to raise, and, even if Petitioners had standing to challenge the collective bargaining agreements they simply do not do so in this case. Review should thus be denied.

II. Review Should Be Denied On the Basis that the Mere Public Adjournment on Good Friday, Which Traces its Pedigree Back to the Origins of this Nation, is Valid Under the Principles of *Marsh v. Chambers*, 463 U.S. 783 (1983), and, Thus, Granting Review Would Not Likely Reach Petitioners' Issues.

While the Petition is devoted entirely to assessing Hawaii law under the "purpose" and "effects" prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), these questions would not necessarily be reached by granting review insofar as the Good Friday holiday is valid in light of

"historical acceptance of the practice" of adjournment on Good Friday. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

Although the Ninth Circuit held that application of *Marsh* to this case was unwarranted in light of *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), and the rejection therein of Justice Kennedy's reading of *Marsh*, *id.* at 602-05, this concern was misplaced, and *Marsh* is squarely applicable. Indeed, the reason *Marsh* requires affirmance without resort to Lemon rests not on the fact that "Hawaii's recognition of Good Friday stems back to its days as a territory," Pet. App. 25, but that the recognition of Good Friday in this Nation finds its origins with the very authors of the First Amendment. See 1 Annals of Cong., 17, 18, 116, 1519 (1834 ed.). *Marsh*, still good law, holds that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." 463 U.S. at 790. Hawaii, having entered the Union last, has done no more than what the Founders did first: adjourn on Good Friday. Saying "a public holiday can affect the entire populace" (Pet. App. 26) does not affect this logic, for closing down the "internal workings" of any branch of Government will have this effect (*id.*). This case is virtually identical to *Marsh*, and, for this reason the Court would not likely reach the Petition's questions presented even if review were granted. Review should thus be denied.

III. Even if *Lemon v. Kurtzman* Applies to Good Friday Holidays Generally, it Would be Inappropriate to Grant Review to Examine Petitioners' "Purpose" Arguments Under the *Lemon* Test.

Petitioners' lead contentions why review is proper are that the panel majority "failed to follow the analytical approach" of this Court's treatment of the "purpose" prong of *Lemon v. Kurtzman*, and simply "substituted its own versions of legislative intent for the legislature's actual intent" (Pet. 13). Both of these claims are flatly incorrect, and, in any case, are ultimately irrelevant to the precise issue here.

The Petition's challenge to the panel majority's view of the test for improper legislative purpose wrongly belittles the sensitive manner in which the majority resolves the tensions in this Court's pronouncements on this front. Contrary to the Petition, the panel did not ignore "the specific purpose" (Pet. at 10), "the relevant purpose" (Pet. at 12), or "the animating purpose" (Pet. at 13) of the statutory addition of Good Friday. Indeed, the panel agreed that if "only one legislative purpose animates a governmental act, then it is sound to evaluate such 'actual' purpose." Pet. App. 30 n.12. It is simply false that the panel "disregarded this Court's earlier precedents such as *Edwards*," and evidenced a "fundamental misunderstanding of the Establishment Clause" (Pet. at 13). The substantial issue under *Lemon*, which Petitioners have never successfully dealt with, is, assuming, *arguendo*, those who voted for the Good Friday holiday did not uniformly have secular motives, how legislative purpose is to be measured. As the majority rightly holds, *Lemon*

itself provides the answer: "the statute must have *a* secular legislative purpose" (Pet. App. 27). A statute fails the purpose prong "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988).

This reading of *Kendrick* accords with this Court's longstanding rule that that the courts should be "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 395 (1983). While this Court has required " 'that the legislature manifest a secular purpose,' " *Edwards*, 482 U.S. at 587, there has never been a mandate that legislators agree on, and publish, a statement of "actual purpose" for laws to pass muster. Petitioners, however, would require just that.

The Good Friday holiday in Hawaii survives the purpose prong, properly conceived. Indeed, the holiday survives well even under Petitioners' own formulation of the test. Petitioners' threshold error, on this front, is in even seeking to plumb the depths of the legislative history when "the face of the statute" manifests "a plausible secular purpose." *Mueller, supra*. There is simply no doubt that, as of 1941, when Good Friday was added as a holiday, the longest gap in the holiday schedule (97 days (98 in leap years)) occurred between Washington's Birthday and Memorial Day. *See* 673 F. Supp. at 1534. Adding the Friday before Easter weekend evidences, on the "face of the statute" the secular intent to facilitate the sort of family gatherings and festive activities associated with Easter.

While it may be that "[t]he holly and the ivy . . . this is not," Pet. App. 50 (Nelson, J., dissenting), this simply does not matter for this Court's purposes. The Petition agrees "secularized" holidays such as Christmas can be recognized (*see* Pet. at 14 n.21, 16), yet, as a device to facilitate the avowedly secular rites of Spring associated with Easter, the Good Friday holiday meets, and overcomes, Petitioners' claims on their own terms. As we have maintained, "to have a three-day Easter Weekend that culminated on Easter Sunday, one must make Good Friday a holiday" (Gov't Ans. Br. at 42, 43 (9th Cir. July 28, 1988)). Petitioners admit a State may facilitate celebration of a " 'holiday's secular aspects' " (Pet. at 16), and the Good Friday holiday, on its face, has such a secular basis, and, on its face, "further[s] this purpose." *Edwards*, 482 U.S. at 586. This secular purpose "is sincere and not a sham." *Id.* at 587. Unlike *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985), no "previously adopted [Hawaii] law already provided for such a [spring holiday]." *Edwards*, 482 U.S. at 588.

Indeed, the legislative history, properly read, confirms the secular purpose of the holiday. The record is clear that, during the entire history of debate over Good Friday's addition to the list of statutory holidays, the terms of the controversy were framed by the pros and cons of adding to the public cost. *See* Pet. App. 31-35. As the majority correctly concludes, the "fair reading" of the 1939 House report on which Petitioners dwell (*see* Pet. at 4-5, 12-13) demonstrates that the primary purpose of the 1939 bill was not only "to have more legal holidays," Pet. App. 34, but to do so in a way that would minimize overall cost. Thus, because "[m]ore and more churches

are now conducting the three-hour service on that day and many business houses are allowing their employees to take time off for this purpose," *id.* at 33, the granting of a holiday on Good Friday would save costs on a variety of fronts. It would minimize the relative disruption to the government, which would get little work done with the private sector largely closed. It would also efficiently dampen wage demands by public workers, who would enjoy the ability to associate with family and acquaintances in the private sector who were similarly dismissed. It is in this context that the Report's language must be read.

Far from implying that secular concerns were mere "ancillary secular objectives" (Pet. at 11), the 1939 Report sought to locate Good Friday within the category of holidays such as Thanksgiving and Christmas, which derive much of their economic import precisely from the fact that they have a "religious significance" to many in society. In this sense, the 1939 Legislature sought to recognize Good Friday "as a cultural phenomenon," *County of Allegheny*, 492 U.S. at 601. When the 1941 Legislature met, this concern was equally present, as the Senate Report shows. *See supra* p. 9. Although the Senate's desire to limit the number of new holidays to as few as possible did not prevail, the purpose of adding Good Friday was not suddenly transformed into an "obersv[ance of] it as a Christian holy day." *County of Allegheny*, 492 U.S. at 601. To the end, the debate over Good Friday was about economics, with the Governor refusing to sign the legislation (but allowing it to become law) because in his view "the holidays were getting a bit thick."

Seen in this light, the Petition's argument that *Lemon's* purpose prong is violated is insubstantial. Even ignoring that the release of the public work force on the Friday before Easter was expected to and can be seen as, facilitating the latter "secularized" holiday (*see* supra p. 9), the Good Friday holiday, as originally enacted, does not evince an improper purpose. Like New York City's annual suspension of alternate-side-of-the-street parking rules during the Jewish High Holy Days, Hawaii's recognition of the social facts of Good Friday do not evince improper sectarian purpose. The Petition's essential argument thus disintegrates into the position that any accommodation not compelled by the Free Exercise Clause is per se invalid under the Establishment Clause. *See* Pet. at 13 n. 20. However, this Court has made clear that this is not the rule, *see County of Allegheny*, 492 U.S. at 573 n. 59, and that the rejection of Free Exercise claims "need not and should not discourage [the Government] from accommodating religious practices." *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 455 (1988). This reasoning, which finds its origins in this century's leading Establishment Clause cases, e.g., *Zorach v. Clausen*, 343 U.S. 30 (1952), has been repeatedly reaffirmed. *See Employment Division v. Smith*, 110 S. Ct. 1595, 1606 (1990).

Moreover, at this stage, it is particularly inappropriate for Petitioners to ask reversal of the lower courts' analysis of Hawaii's purpose in enacting the 1941 law. As Justice White aptly observed in *Edwards*, "if the meaning ascribed to a state statute by a court of appeals is a rational construction of the statute, [this Court] normally accept[s] it," 482 U.S. at 609 (White, J., concurring in the

judgment), and this "usual rule applies in First Amendment cases." *Id.* Although even the most searching review would reveal the Ninth Circuit's judgment to be correct, this added fact makes review particularly inapt.

Indeed, the Petition does not deal at all with the fact that, in Hawaii today, the collective bargaining agreements independently require a Good Friday holiday. Thus, even if the original purpose of the Good Friday statute were improper, that would not be relevant to the real "controversy" here. The Petition makes no argument that the purpose of the bargaining agreements is improper, and collectively bargained Good Friday holidays have been universally upheld. *See supra* p. 6.

IV. The Petition's Contention that Adoption of a Good Friday Holiday, as in Hawaii, Violates *Lemon's* Proscription on Improper Effect of Advancing Religion Misconstrues The Law and the Record, and Is No Basis for Review.

The Petition's final ground for review, the claim that it is "inescapable" that the Good Friday holiday has impermissible sectarian effects (Pet. at 15-18), could not be more wrong.

First, Petitioners' argument is refuted by this Court's recognition that effects analysis turns on whether "religion was substantially aided." *Id.* Indirect benefits as the "congressional and Executive recognition of the origins of [Christmas] as 'Christ's Mass,' " *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984), are not improper effects. Indeed, unlike numerous laws this Court has upheld, *e.g.*, *McGowan v. Maryland*, 366 U.S. 420 (1961), the holiday

here makes no effort to channel the public into church. *Cf. Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) (time off corresponding to three-hour service struck down); *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16 (1981) (bar on Good Friday liquor sales). That the day's title may make "references to religious organizations" is irrelevant so long as the holiday is granted to all neutrally. *Kendrick*, 487 U.S. at 607 & n.11.

Second, the Petition does not overcome the lower courts' conclusion that the "context" of the holiday, free of ceremony, symbol, and Government exhortation confirms compliance with the Establishment Clause. The Petition agrees that a State may recognize a "holiday's secular aspects" (Pet. at 16), but gives no reason why adjournment from public business is not just such a permissible secular "aspect" to recognize.

Third, while the Petition points to other holidays that were not "similarly" acknowledged, this claim was raised below in the context of an "effects" challenge only by a Petition for Rehearing in the court below, plainly too late to counsel review here. Acceptance of Petitioners' argument, moreover, would make Christmas itself plainly unconstitutional.

Fourth, and relatedly, the Petition wrongly accuses the majority of condoning the differential "treatment" of adherents and nonadherents, thus violating " '[t]he clearest command of the Establishment Clause.' " *See* Pet. at 18 (quoting *County of Allegheny*, 492 U.S. at 605). But the decision below is faithful to the rule that legitimate accommodation may not "impact adherents and nonadherents equally." *See* Pet. App. at 42 n.17. The fact that

Christians may derive, to use the economic jargon, "greater marginal utility" from the Good Friday holiday is irrelevant if the holiday is available to all. *See Witters v. Washington Dep't of Services*, 474 U.S. 481, 486-87 (1986).

Petitioners ultimately urge that there must be some "secular celebration" (Pet. at 16), apart from a holiday's status as a day of rest (such as, in the case of Christmas, hanging stockings), for public workers to be released. But this argument does precisely the sort of violence to the values underlying the religion clauses that Petitioners seek to avoid. What makes the statutory holiday on Christmas acceptable is not the fact that Jews or Buddhists feel "comfortable" about decorating a tree, for such patronizing arguments "require [this Court] to rule that some religious adherents misunderstand their own religious beliefs." *Lyng, supra*, 485 U.S. at 457-58. The recognition of the "cultural phenomenon" of a certain religion's holiday (*County of Allegheny*, 492 U.S. at 601), if available to all faiths, leads to benefits to religion that are only "indirect, remote, and incidental." *Lynch*, 465 U.S. at 668. When it is considered that Hawaii's Good Friday holiday is proximately caused by collective bargaining, this is even more true.

Petitioners' "effects" analysis is no basis for review.

V. Even if the Questions Presented in the Petition Are Jurisdictionally Substantial, the Absence of any Conflict in the Lower Appellate Courts, and the Number of Jurisdictions That May Be Affected by a Precipitous Grant of Review in This Case, Warrants Denial of Review and Further Litigation.

As the court of appeals recognized, the issue whether Good Friday may be lawfully adopted as a state holiday is an issue of first impression at the federal court of appeals level. Indeed, Petitioners do not assert any inter-circuit conflict or conflict with a decision of a state's highest court. Indeed, the only such decision even arguably in conflict, *Griswold Inn, Inc. v. State,* 183 Conn. 552, 441 A.2d 16 (1981), was tried on stipulated facts not found here, and focuses upon the factually distinct issue of the validity of a *closing* law on Good Friday. No such mandatory closings for the private sector are remotely present in Hawaii's holiday.

Even if, despite the foregoing, the Petition presents any substantial question, the absence of any real conflict below strongly counsels against review, particularly where litigation has not even commenced over the issues here in many potentially affected jurisdictions. If the Petition is at all substantial, review should nonetheless be denied so that the views of at least some of the ten other federal circuits, and state courts, potentially affected could be rendered and assist this Court.

CONCLUSION

For the foregoing reasons the writ should be denied.

Dated: Honolulu, Hawaii, January 17, 1992.

RONALD B. MUN*
Corporation Counsel
City and County of Honolulu
KARL K. ICHIDA
Deputy Corporation Counsel
City and County of Honolulu
Honolulu Hale
Honolulu, Hawaii 96813
(808) 523-4832
Counsel for Respondents Mayor, Managing Director, and Director of Civil Service, City and County of Honolulu ("City and County Respondents")

**Counsel of Record for City and County Respondents*

WARREN PRICE, III
Attorney General
State of Hawaii
STEVEN S. MICHAELS**
Deputy Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Counsel for Respondents Governor of Hawaii and Director of Personal Services, State of Hawaii ("State of Hawaii Respondents")

***Counsel of Record for State of Hawaii Respondents*

APPENDIX "A"

KIRK CASHMERE
ACLU of Hawaii
33 S. King St., Suite 412
Honolulu, Hawaii 96813
Telephone: (808) 545-1722

KAREN ESSENE
707 Richards St., PH 3
Honolulu, Hawaii 96813
Telephone: (808) 531-1411

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NELL A. CAMMACK, et al., Plaintiffs, vs. JOHN WAIHEE, et al., Defendants.	CIVIL NO. 87-0260 NOTICE OF APPEAL; CERTIFICATE OF SERVICE

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DEC 4 1987

at 1 o'clock and 40 min. P.M.
WALTER A. Y. N. CHINN, CLERK

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs above-named hereby appeal to the U.S. Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on December 1, 1987 by Judge Alan C. Kay in the U.S. District Court for the District of Hawaii pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure.

DATED: Honolulu, Hawaii, December 4, 1987.

/s/ Kirk Cashmere
KIRK CASHMERE
KAREN ESSENE
Attorneys for Plaintiffs

APPENDIX "B"
(PART "1")

ACT 66.

AN ACT RELATING TO HOLIDAYS.

Be it enacted by the Legislature of the Republic of Hawaii:

SECTION 1. The following days of each year are hereby set apart and established as national holidays, to wit:

The first and seventeenth days of January, the eleventh day of June, the fourth day of July, the third Saturday of September, the twenty-eighth day of November and the twenty-fifth day of December.

SECTION 2. This Act shall take effect upon publication.

Approved this 13th day of June, A.D. 1896.

SANFORD B. DOLE,
President of the Republic of Hawaii.

APPENDIX "B"
(PART "2")

ACT 55.

AN ACT TO AMEND SECTION 1, ACT 66, OF THE SESSION LAWS OF 1896.

Be it Enacted by the Legislature of the Territory of Hawaii:

SECTION 1. Section 1 of Chapter 66, of the Session laws of 1896, is amended to read as follows:

Section 1. The following days of each year are hereby set apart and established as Territorial Holidays, to wit:

The first day of January,

The twenty-second day of February,

The thirtieth day of May,

The eleventh day of June,

The fourth day of July,

The first Monday in September, known as Labor Day,

The third Saturday in September, and

The twenty-fifth day of December.

SECTION 2. This Act shall take effect from and after the date of its approval.

Approved this 28th day of April, 1903.

SANFORD B. DOLE,
Governor of the Territory of Hawaii.

APPENDIX "B"
(PART "3")

ACT 20

AN ACT

TO AMEND SECTION 137 OF THE REVISED LAWS OF HAWAII OF 1915, RELATING TO HOLIDAYS.

Be it Enacted by the Legislature of the Territory of Hawaii:

SECTION 1. Section 137, Chapter 16, of the Revised Laws of Hawaii of 1915, is hereby amended to read as follows:

"Section 137. Designated. The following days of each year are set apart and established as Territorial holidays, to wit:

The first day of January,

The twenty-second day of February,

The thirtieth day of May,

The eleventh day of June,

The fourth day of July,

The first Monday in September, known as Labor Day,

The third Saturday in September, and

The twenty-fifth day of December, and

All election days, both primary as well as general, in such county or city and county wherein such election is held.

And any day designated by proclamation of the President of the United States as a Day of Thanksgiving,

fasting or religious observance, or designated by proclamation of the Governor of the Territory as a holiday, shall be a Territorial holiday."

SECTION 2. This Act shall take effect upon its approval.

Approved this 23rd day of March, A. D. 1915.

LUCIUS E. PINKHAM,
Governor of the Territory of Hawaii.

APPENDIX "B"
(PART "4")

ACT 54

[S. B. No. 11]

AN ACT TO AMEND SECTION 137 OF THE REVISED LAWS OF HAWAII, 1915, AS AMENDED BY ACT 20 OF THE SESSION LAWS OF 1915, RELATING TO HOLIDAYS.

Be it Enacted by the Legislature of the Territory of Hawaii:

SECTION 1. Section 137 of the Revised Laws of Hawaii, 1915, as amended by Act 20, Session Laws of 1915, is hereby amended to read as follows:

"Section 137. Designated. The following days of each year are set apart and established as territorial holidays, to wit:

The first day of January,

The twenty-second day of February,

The thirtieth day of May,

The eleventh day of June, to be known as Kamehameha Day,

The fourth of July,

The first Monday in September, known as Labor Day,

The third Saturday in September,

The eleventh day of November, to be known as Victory Day,

The twenty-fifth day of December, and all election days, both primary as well as general, in such county or city and county wherein such election is held;

And any day designated by proclamation of the President of the United States as a day of thanksgiving, fasting or religious observance, or designated by proclamation of the governor of the Territory as a holiday, shall be a territorial holiday."

SECTION 2. This Act shall take effect upon its approval.

Approved this 8th day of April, A. D. 1919.

C. J. McCARTHY,
Governor of the Territory of Hawaii.

APPENDIX "B"
(PART "5")

CHAPTER 1. COMMON LAW AND STATUTES.

HOLIDAYS.

[A-1] An Act to Amend Section 21 of the Revised Laws of Hawaii 1935, Relating to Holidays.

Be It Enacted by the Legislature of the Territory of Hawaii:

Section 1. Section 21 of the Revised Laws of Hawaii 1935, is hereby amended to read as follows:

"**Sec. 21. Holidays designated.** The following days of each year are set apart and established as territorial holidays, to wit:

The first day of January,

The twelfth day of February,

The twenty-second day of February,

The Friday preceding Easter Sunday, known as Good Friday,

The thirtieth day of May,

The eleventh day of June, to be known as Kamehameha Day,

The fourth of July,

The first Monday in September, known as Labor Day,

The third Saturday in September,

The eleventh day of November, to be known as Armistice Day,

The twenty-fifth day of December, and all election days, both primary as well as general, in such county or city and county wherein such election is held;

And any day designated by proclamation by the President of the United States as a day of thanksgiving, fasting or religious observance, or designated by proclamation by the governor of the territory as a holiday, shall be a territorial holiday; **provided,** however, that when any of such holidays fall on a Sunday, the same may be, by proclamation of the governor, observed upon the following Monday.

Whenever in the opinion of the governor a public emergency shall exist, and it shall to him seem to be in the public interest, he may by proclamation designate and proclaim as legal banking holidays in the territory such number of consecutive days as in his judgment the emergency may require, with power in him to extend the same as may seem advisable; which proclamation of holidays shall not be taken as relating to any business other than that of banking and kindred operations, nor as prohibiting, perforce, any voluntary conduct of banking business, in whole or in part, except to the extent declared in such proclamation or in any further proclamation in enlargement or modification thereof." [L. 1896, c. 66, s.1; am. L. 1903, c. 55, s. 1; am. L. 1911, c. 167, s. 1; s. 137; am. L. 1915, c. 20, s. 1; am. L. 1919, c. 54, s. 1; am. L. 1923, c. 151, s. 1; am. L. 1933, c. 3, s.1; R. L. 1935, s. 21; am. L. 1941, c. 132, s. 1.]

Section 2. This Act shall take effect upon its approval.

(Became effective April 30, 1941, without the Governor's signature.) H.B. 154, Act 132.

APPENDIX "C"
(PART "1")

UNIT 1

AGREEMENT

Between
STATE OF HAWAII
CITY & COUNTY OF HONOLULU
COUNTY OF HAWAII
COUNTY OF MAUI
COUNTY OF KAUAI

and

UNITED PUBLIC WORKERS
LOCAL 646
AMERICAN FEDERATION OF
STATE, COUNTY & MUNICIPAL EMPLOYEES,
AFL-CIO

BLUE COLLAR NON-SUPERVISORY
BARGAINING UNIT

JULY 1, 1985-JUNE 30, 1987

THIS AGREEMENT is entered into this 29th day of March, 1985 by and between the STATE OF HAWAII, the CITY AND COUNTY OF HONOLULU, the COUNTY OF HAWAII, the COUNTY OF MAUI, AND THE COUNTY OF KAUAI, hereinafter collectively called the EMPLOYER, and the UNITED PUBLIC WORKERS, LOCAL 646, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, hereinafter called the UNION.

Section 1. RECOGNITION.

1.01 The Employer recognizes the Union as the exclusive bargaining representative for those public employees in the blue collar non-supervisory unit.

[MATERIAL DELETED]

Section 35. HOLIDAYS.

35.01 The following days of each year are established as holidays:

New Year's Day	-First day of January
Presidents' Day	-Third Monday in February
Prince Jonah Kuhio Kalanianaole Day	-Twenty-sixth day of March
Good Friday	-Friday preceding Easter Sunday
Memorial Day	-Last Monday in May
King Kamehameha I Day	-Eleventh day of June
Independence Day	-Fourth day of July
Admission Day	-Third Friday in August
Labor Day	-First Monday in September
Discoverer's Day	-Second Monday in October
Veterans' Day	-Eleventh day of November
Thanksgiving Day	-Fourth Thursday in November
Christmas Day	-Twenty-fifth day of December

All election days, except primary and special election days, in the County wherein the election is held.

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

35.02 Observance of Holidays.

(a) Employees whose workdays fall on Monday through Friday during the workweek

in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding Holiday
Sunday	Monday following Holiday
Workday	Workday

(b) Employees whose workdays fall on other than Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Day off	First workday after the day off
Workday	Workday

35.03 It shall be the desire of the parties to this Agreement that holiday work assignments be shared equitably among employees in a work unit. To accomplish this a rotational system by seniority will be established whereby every employee within an organizational unit will be given the opportunity to participate in holiday work assignments on an equitable basis insofar as the requirements of the mission will permit and in accordance with skills required. Suitable records must be maintained by supervisors to assure that each employee receives substantially the same consideration.

35.04 Upon request of the Union, the Employer or his representative shall meet and consult with the Union when developing the holiday assignment system.

[MATERIAL DELETED]

APPENDIX "C"
(PART "2")

UNIT 2
AGREEMENT

This Agreement is made this 19th day of April, 1985, by and between the Hawaii Government Employees' Association, AFSCME, Local 152, AFL-CIO, hereinafter called the Union, and the State of Hawaii including the Board of Education and the Board of Regents of the University of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai, hereinafter called the Employer.

ARTICLE 1 – RECOGNITION

A. The Employer recognizes the Union as the exclusive bargaining agent of the unit certified by the Hawaii Public Employment Relations Board consisting of all blue-collar supervisory employees employed by the State of Hawaii including the Board of Education and the Board of Regents of the University of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai.

B. The term "Employee" as used in this Agreement refers to Employees in the bargaining unit.

C. Whenever in this Agreement the masculine gender is used, it shall be deemed to include the feminine gender.

[MATERIAL DELETED]

ARTICLE 33 – HOLIDAYS

A. Legal holidays shall be as provided under Section 8-1, HRS, as amended. Such holidays are:

New Year's Day
President's Day
Prince Jonah Kuhio Kalanianaole Day
Good Friday
Memorial Day
King Kamehameha I Day
Independence Day
Admission Day
Labor Day
Discoverers' Day
Veterans' Day
Thanksgiving Day
Christmas Day

All elections days, except primary and special election days, in the county wherein the election is held;

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

B. Observance of Holidays.

1. Employees whose workdays fall on Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding holiday
Sunday	Monday following holiday
Workday	Workday

2. Employees whose workdays fall on other than Monday through Friday during the workweek in which a

holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Day Off	First workday after the day off
Workday	Workday

[MATERIAL DELETED]

APPENDIX "C"

(PART "3")

UNIT 3
AGREEMENT

This Agreement is made this 19th day of April, 1985, by and between the Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO, hereinafter called the Union, and the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai, hereinafter called the Employer.

ARTICLE 1 - RECOGNITION

A. The Employer recognizes the Union as the exclusive bargaining agent of the unit certified by the Hawaii Public Employment Relations Board consisting of white-collar non-supervisory Employees employed by the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai.

B. The term "Employee" as used in this agreement refers to Employees in the bargaining unit.

C. Wherever in this Agreement the masculine gender is used, it shall be deemed to include the feminine gender.

[MATERIAL DELETED]

ARTICLE 32 - HOLIDAYS

A. Legal holidays shall be as provided under Section 8-1, HRS, as amended. Such holidays are:

New Year's Day
President's Day
Prince Jonah Kuhio Kalanianacle Day
Good Friday
Memorial Day
King Kamehameha I Day
Independence Day
Admission Day
Labor Day
Discoverers' Day
Veterans' Day
Thanksgiving Day
Christmas Day

All election days, except primary and special election days, in the county wherein the election is held.

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

B. Observance of Holidays.

1. Employees whose workdays fall on Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding holiday
Sunday	Monday following holiday
Workday	Workday

2. Employees whose workdays fall on other than Monday through Friday during the workweek in which a

holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Day off	First workday after the day off
Workday	Workday

[MATERIAL DELETED]

APPENDIX "C"
(PART "4")

UNIT 4
AGREEMENT

This Agreement is made this 19th day of April, 1985, by and between the Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO, hereinafter called the Union, and the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai, hereinafter called the Employer.

ARTICLE 1 - RECOGNITION

A. The Employer recognizes the Union as the exclusive bargaining agent of the unit certified by the Hawaii Public Employment Relations Board consisting of white-collar supervisory Employees employed by the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai.

B. The term "Employee" as used in this Agreement refers to Employees in the bargaining unit.

C. Wherever in this Agreement the masculine gender is used, it shall be deemed to include the feminine gender.

[MATERIAL DELETED]

ARTICLE 32 - HOLIDAYS

A. Legal holidays shall be as provided under Section 8-1, HRS, as amended. Such holidays are:

New Year's Day
Presidents' Day
Prince Jonah Kuhio Kalanianaole Day
Good Friday
Memorial Day
King Kamehameha I Day
Independence Day
Admission Day
Labor Day
Discoverers' Day
Veterans' Day
Thanksgiving Day
Christmas Day

All election days, except primary and special election days, in the county wherein the election is held;

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

B. Observance of Holidays.

1. Employees whose workdays fall on Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding holiday
Sunday	Monday following holiday
Workday	Workday

2. Employees whose workdays fall on other than Monday through Friday during the workweek in which a

holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Day Off	First workday after the day off
Workday	Workday

[MATERIAL DELETED]

APPENDIX "C"
(PART "5")

AGREEMENT
BETWEEN

STATE OF HAWAII
BOARD OF EDUCATION

AND

HAWAII STATE
TEACHERS ASSOCIATION

July 1, 1985-June 30, 1987

ARTICLE 1 – RECOGNITION

This Agreement entered into this 1st day of July, 1985 by and between the State of Hawaii, Board of Education, hereinafter called the "Employer" as defined in Section 89-2(9). Hawaii Revised Statutes, and the Hawaii State Teachers Association, hereinafter called the "Association."

Pursuant to certification by the Hawaii Public Employment Relations Board in Case Number 1, the Employer recognizes the Association for the purposes of collective bargaining pursuant to the Hawaii Public Employment Act, as the exclusive representative of a unit consisting of teachers and other personnel of the Department of Education under the same salary schedule, pursuant to Section 297-33(d). Hawaii Revised Statutes.

EXCLUDING: Part-time teachers (less than 20 hours per week). Substitute Teachers, Adult Education Teachers except those on annual contract, Summer School Teachers, Summer School Supportive Staff (Counselors, Librarians, etc.); Special Contract Teachers (Consultants,

Special Projects, Workshop Teachers, etc.); ROTC Instructors, Driver Training and Educational Instructors, Model Cities Teachers, PL 89-10 Title 1 (not on regular teachers' salary schedule); Language Arts Lay Readers; Non-Teacher Athletic Coaches; Home/Hospital Instruction Teachers (Hourly or part-time less than 20 hours per week); Non-Teachers, Non-Athletic Activities Supervisors; Part-time Advisors, PL 89-10 Title 1 (Drop Out Program); Civil Defense Teachers; National Teachers Corps Interns; Student Teachers; Vocational Home Economics Teachers (Part-time less than 20 hours per week); Vocational Agriculture Teachers (Part-time less than 20 hours per week).

It is understood that references to male teachers shall include female teachers.

[MATERIAL DELETED]

ARTICLE XVI – WORK YEAR

The work year for bargaining unit members shall be as previously established and shall be no more than one hundred eighty (180) days: one (1) day of which shall be without students at the beginning of the school year and one (1) day of which shall be without students at the end of the school year.

Bargaining unit personnel shall have one day set aside for Teacher Institute Day.

The Employer shall not schedule nor require work to be performed on any of the following holidays:

1 Labor Day
2 Discovers' Day
3 Veterans' Day
4 General Election day
5 Thanksgiving Day
6 Day after Thanksgiving
7 Christmas Day
8 New Year's Day
9 Presidents Day
10 Kuhio Day
11 Good Friday
12 Memorial Day
13 Kamehameha Day

Vacations for bargaining unit personnel shall be the day after Thanksgiving, two (2) weeks at Christmas, one (1) week in the Spring.

The work year for bargaining unit members shall not extend beyond Kamehameha Day.

Employees are not required to report to work during the winter or spring vacations or during the period beginning with the ending of the teaching year in June and ending with the beginning of the new teaching year in September of the following school; however,

1. Employees may voluntarily report to duty without compensation; or

2. Employees who are officially recalled to duty by the Employer according to established procedures and who agree to perform work shall be compensated at the rate of 1/180 times (x) his/her annual salary for each day worked. Provided, however, that librarians and registrars shall be provided extra compensation for such work only when it exceeds the work obligation for which they receive a pay differential.

[MATERIAL DELETED]

APPENDIX "C"
(PART "6")

UNIT 6
AGREEMENT

This Agreement is made this 19th day of April, 1985, by and between the Hawaii Government Employees' Association, AFSCME Local 152, AFL-CIO, hereinafter called the Union and the State of Hawaii, Board of Education including the Department of Education, hereinafter called the Board.

ARTICLE 1 - RECOGNITION

The Board recognizes the Union as the exclusive bargaining agent of a unit consisting of all educational officers employed by the Board as certified by the Hawaii Public Employment Relations Board pursuant to Chapter 89, Hawaii Revised Statutes.

ARTICLE 2 - CONFLICT

If there is any conflict between the provisions of this Agreement and any of the rules and regulations of the Board, other personnel regulations applicable to educational officers, or any contracts between the Board and educational officers, the terms of this Agreement shall prevail.

[MATERIAL DELETED]

ARTICLE 3 - MAINTENANCE OF RIGHTS AND PRIVILEGES

A. Except as modified herein, educational officers shall retain all rights, benefits, and privileges pertaining to their conditions of employment contained in the School Code at the time of the execution of this Agreement.

B. Subject to the foregoing paragraph, nothing contained herein shall be interpreted as interfering with the Board's right to make, amend, revise, or delete any portion of the School Code; provided, however, that the Union shall be consulted on any changes to be made.

APPENDIX "C"
(PART "7")

AGREEMENT

This Agreement is made this 19th day of April 1985 by and between the State of Hawaii and the Board of Regents of the University of Hawaii, hereinafter called the Employer or Public Employer, as defined in Section 89-2, H.R.S., and the University of Hawaii Professional Assembly, hereinafter called the Union.

ARTICLE I, RECOGNITION

The Employer recognizes the Union as the exclusive representative of Collective Bargaining Unit 7, as certified by the Hawaii Public Employment Relations Board. The public employees composing the unit are hereinafter referred to as Faculty Members or Faculty.

[MATERIAL DELETED]

F. HOLIDAYS

1. Legal holidays shall be observed as provided under Section 8-1, H.R.S., as amended. Such holidays are:

   New Year's Day .....First day of January
   Presidents' Day.....Third Monday in February
   Kuhio Day .....Twenty-sixth day of March
   Good Friday ...Friday preceding Easter Sunday
   Memorial Day .....Last Monday in May
   Kamehameha Day.....Eleventh day of June
   Independence Day.....Fourth day of July
   Admission Day .....Third Friday in August
   Labor Day .....First Monday in September

Discoverers' Day....Second Monday in October
Veterans' Day .....Eleventh day of November
Thanksgiving Day Fourth Thursday in November
Christmas Day ...Twenty-fifth day of December

All election days, except primary and special election days, in the county wherein the election is held.

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

2. If any of the State's legal holidays falls on Sunday, the following Monday shall be observed as a holiday. If such a day falls on a Saturday, the preceding Friday shall be observed as a holiday.

3. Holidays shall be credited toward the accrual of vacation and sick leave.

[MATERIAL DELETED]

APPENDIX "C"

(PART "8")

UNIT 09
AGREEMENT

This Agreement is made this 19th day of April, 1985, by and between the Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO, hereinafter called the Union, and the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai, hereinafter called the Employer.

ARTICLE 1 – RECOGNITION

A. The Employer recognizes the Union as the exclusive bargaining agent of the unit certified by the Hawaii Public Employment Relations Board consisting of Registered Professional Nurses employed by the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai.

B. The term "Employee" as used in this Agreement refers to Employees in the bargaining unit.

C. Whenever in this Agreement the feminine gender is used, it shall be deemed to include the masculine gender.

[MATERIAL DELETED]

ARTICLE 40 – HOLIDAYS

A. Legal holidays shall be as provided under Section 8-1, HRS, as amended. Such holidays are:

New Year's Day
Presidents' Day
Prince Jonah Kuhio Kalanianaole Day
Good Friday
Memorial Day
King Kamehameha I Day
Independence Day
Admission Day
Labor Day
Discoverers' Day
Veterans' Day
Thanksgiving Day
Christmas Day

All election days, except primary and special election days, in the county wherein the election is held;

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

B. Observance of Holidays

1. Employees whose workdays fall on Monday through Friday during the work week in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding holiday
Sunday	Monday following holiday
Workday	Workday

2. Employees whose workdays fall on other than Monday through Friday during the work week in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Day Off	First workday after the
Workday	day off Workday

[MATERIAL DELETED]

APPENDIX "C"
(PART "9")

UNIT 10

AGREEMENT

Between
STATE OF HAWAII
CITY & COUNTY OF HONOLULU
COUNTY OF HAWAII
COUNTY OF MAUI
COUNTY OF KAUAI

and

UNITED PUBLIC WORKERS
LOCAL, 646
AMERICAN FEDERATION OF
STATE, COUNTY & MUNICIPAL EMPLOYEES,
AFL-CIO

BLUE COLLAR NON-SUPERVISORY
BARGAINING UNIT

JULY 1, 1985 - JUNE 30, 1987

THIS AGREEMENT is entered into this 29th day of March, 1985 by and between the STATE OF HAWAII, the CITY AND COUNTY OF HONOLULU, the COUNTY OF HAWAII, the COUNTY OF MAUI, AND THE COUNTY OF KAUAI, hereinafter collectively called the EMPLOYER, and the UNITED PUBLIC WORKERS, LOCAL 646, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, hereinafter called the UNION.

Section 1. RECOGNITION.

1.01 The Employer recognizes the Union as the exclusive bargaining representative for those public employees in the nonprofessional hospital and institutional workers' unit, non-supervisory and supervisory.

This unit consists of employees in such areas as health care, corrections, and emergency medical services employed at hospitals, correctional facilities, detention facilities, emergency medical service units, mental health clinics, and community health clinics.

[MATERIAL DELETED]

Section 35. HOLIDAYS.

35.01 Legal holidays shall be as provided under Section 8-1, Hawaii Revised Statutes, as amended. Such holidays are:

New Year's Day	– First day of January
Presidents' Day	– Third Monday in February
Prince Jonah Kuhio Kalanianaole Day	– Twenty-sixth day of March
Good Friday	– Friday preceding Easter Sunday
Memorial Day	– Last Monday in May
King Kamehameha I Day	– Eleventh day of June
Independence Day	– Fourth day of July
Admission Day	– Third Friday in August
Labor Day	– First Monday in September

Discoverers' Day	– Second Monday in October
Veterans' Day	– Eleventh Day of November
Thanksgiving Day	– Fourth Thursday in November
Christmas Day	– Twenty-fifth day of December

All election days, except primary and special election days, in the county wherein the election is held.

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

35.02 Observance of Holiday.

a. Employees whose workdays fall on Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding Holiday
Sunday	Monday following Holiday
Workday	Workday

b. Employees whose workdays fall on other than Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Dayoff	First workday after the dayoff
Workday	Workday

35.03 it shall be the desire of the parties to this Agreement that holiday work assignments be shared equitably among employees in a work unit. To accomplish this a rotational system by seniority will be established whereby every employee within an organizational

unit will be given the opportunity to participate in holiday work assignments on an equitable basis insofar as the requirements of the mission will permit and in accordance with skills required. Suitable records must be maintained by supervisors to assure that each employee receives substantially the same consideration.

35.04 Upon request of the Union, the Employer or his representative shall meet and consult with the Union when developing the holiday assignment system.

[MATERIAL DELETED]

APPENDIX "C"
(PART "10")

AGREEMENT

Hawaii Fire Fighters Association

IAFF Local Union No. 1463

AGREEMENT

This agreement is made and entered into this ___ day of ___, 1983, by and between the State of Hawaii, the City and County of Honolulu and the County of Hawaii, the County of Maui and the County of Kauai, hereinafter referred to as the Employer, and the Hawaii Fire Fighters Association. Local 1463, IAFF, AFL-CIO, hereinafter referred to as the Union.

This Agreement covers all employees for whom the Union is recognized as exclusive bargaining representative pursuant to Section 1: Recognition.

It is the purpose of this Agreement to achieve and maintain harmonious and cooperative relations between the Employer and the Union, to provide for equitable and peaceful adjustment of differences which may arise and to establish proper standards of wages, hours, and other terms and conditions of employments.

Section 1. RECOGNITION.

The Employer recognizes the Union as the certified exclusive bargaining representative of all firefighters, including supervisory personnel, of the State and its political subdivisions whose principal duties are to prevent and fight fires, except for officers and employees

who are excluded or may be excluded from the bargaining unit by law and the Hawaii Public Employment Relations Board.

The Employer shall provide the Union with a roster of its employees by company or unit assignment and shall maintain its currency. The Union shall provide the Employer with a list of its officers, stewards, and authorized representatives and maintain its currency.

[MATERIAL DELETED]

Section 24. HOLIDAYS.

A. Holidays shall be as provided under Section 8-1. HRS as amended. Such holidays are:
   - New Year's Day
   - President's Day
   - Prince Jonah Kuhio Kalanianaole Day
   - Good Friday
   - Memorial Day
   - King Kamehameha Day
   - Independence Day
   - Admission Day
   - Labor Day
   - Thanksgiving Day
   - Christmas Day
   - All election days, except primary and special election days, in the county wherein the election is held.
   - Any day designated by proclamation by the President of the United States or designated by proclamation by the Governor of the State as a holiday.

B. Observance of holidays

(1) Employees whose workdays fall on Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding holiday
Sunday	Monday following holiday
Workday	Workday

(2) Employees whose workdays fall on other than Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Day off	First workday after the day off
Workday	Workday

(3) Whenever an employee is required to work on his designated holiday he shall be paid, in addition to his straight time pay at the rate of one and one-half (1 1/2) times his hourly rate of pay for all hours worked on the holiday; provided that whenever the major portion of a shift falls on a holiday, the entire shift shall be considered holiday work.

C. The following provisions shall apply in the case of employees assigned to 24-hour shifts, helicopter duty or any work schedule in excess of 40 hours per week:

(1) If a holiday falls on a non-work day, the next scheduled work day following such non-work day shall be held and considered to be a holiday for such employee in lieu of such day which so occurs on such non-work day.

(a) A holiday falls on a work day if the major portion of a scheduled shift falls on the holiday.

(b) A holiday falls on a non-work day if the major portion of a scheduled shift does not fall on the holiday.

(2) Holiday Premium Pay – Subject to the approval of the respective legislative bodies, effective July 1, 1977, whenever an employee performs scheduled work on his designated holiday, he shall be paid in addition to his straight time pay, at the rate of one and one-half (1 1/2) times his hourly rate of pay which shall be based on 40 hours per week for all hours worked on the holiday up to a maximum of eight (8) hours; provided that when overtime work is performed by an employee on his designated holiday, he shall be paid at the appropriate overtime rate for such overtime work.

D. All employees whose work schedule permit shall be entitled to have the holiday or the shift for that holiday off without loss of pay or benefits. For purposes of determining overtime, holidays

not worked as provided herein shall be counted as time worked.

[MATERIAL DELETED]

APPENDIX "C"
(PART "11")

UNIT 13
AGREEMENT

This Agreement is made this 19th day of April, 1985, by and between the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, hereinafter called the Union, and the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County of Maui, and the County of Kauai, hereinafter called the Employer.

ARTICLE 1 – RECOGNITION

A. The Employer recognizes the Union as the exclusive bargaining agent of the unit certified by the Hawaii Public Employment Relations Board consisting of professional and scientific employees, other than registered professional nurses employed by the State of Hawaii, the City and County of Honolulu, the County of Hawaii, the County Maui, and the County of Kauai.

B. The term "Employee" as used in this Agreement refers to Employees in the bargaining unit.

C. Whenever in this Agreement the masculine gender is used, it shall be deemed to include the feminine gender.

[MATERIAL DELETED]

ARTICLE 34 – HOLIDAYS

A. Legal holidays shall be as provided under Section 8-1, HRS, as amended. For informational purposes, such holidays are:

New Year's Day, the first day of January
President's Day, the third Monday in February
Prince Jonah Kuhio Kalanianaole Day, the twenty-sixth day of March
Good Friday, the Friday preceding Easter Sunday
Memorial Day, the last Monday in May
King Kamehameha I Day, the eleventh day of June
Independence Day, the fourth day of July
Admission Day, the third Friday in August
Labor Day, the first Monday in September
Discoverers' Day, the second Monday in October
Veterans' Day, the eleventh day in November
Thanksgiving Day, the fourth Thursday in November
Christmas Day, the twenty-fifth day of December

All election days, except primary and special election days, in the county wherein the election is held.

Any day designated by proclamation by the President of the United States or by the Governor as a holiday.

B. Observance of Holidays.

1. Employees whose workdays fall on Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Saturday	Friday preceding holiday
Sunday	Monday following holiday
Workday	Workday

2. Employees whose workdays fall on other than Monday through Friday during the workweek in which a holiday occurs shall observe such holiday as provided below:

Day Holiday Falls	Day Holiday Observed
Day off	First workday after the day off
Workday	Workday

[MATERIAL DELETED]

APPENDIX "D"

Hawaii Revised Statutes § 1-29 (1985) provides in relevant part that

> *§ 1-29 Computation of Time.* The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a Sunday or holiday and then it is also excluded.

Hawaii Revised Statutes § 80-1 (1985) provides that

> *§ 80-1 Office hours.* Offices of the State and counties and independent boards and commissions thereof shall open for the transaction of public business between the hours of 7:45 a.m. and 4:30 p.m., Monday to Friday, inclusive. By executive order, the governor may modify the hours of business offices, other agencies and schools in order to meet a demonstrated need for public services, to provide for the efficient operation of business, to encourage energy conservation, and to reduce traffic congestion. Offices shall be closed on Saturday, except those which public convenience require shall remain open from 8 a.m. to noon on Saturday. Offices open on Saturday may be staffed with a skeleton force. A lunch period of forty-five minutes will be allowed all governmental personnel, which shall not constitute working time under this section.

Haw. Rev. Stat. § 89-9 (1985 and Supp. 1991) provides that

> **§ 89-9 Scope of negotiations.** (a) The employer and the exclusive representative shall meet at reasonable times, including meetings in

advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, the number of incremental and longevity steps and movement between steps within the salary rage, the amounts of contributions by the State and respective counties to the Hawaii public employees health fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

(b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other in writing, setting forth the time and place of the meeting desired and generally the nature of the business to be discussed, and shall mail the notice by certified mail to the last known address of the other party sufficiently in advance of the meeting.

(c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification and reclassification, benefits of but not contributions to the Hawaii public employees health fund, retirement benefits, and the salary ranges now

provided by law; provided that the number of incremental and longevity steps, the amount of wages to be paid in each range and step, and movement between steps, within the salary range shall be negotiable. The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31, and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies; provided that the employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit, procedures governing the suspension, demotion, discharge or other disciplinary actions taken against employees, and procedures governing the lay off of employees; provided further that violations of the procedures so negotiated may be the subject of a grievance process agreed to by the employer and the exclusive representative.

(e) Negotiations relating to contributions to the Hawaii public employees health fund shall be for the purpose of agreeing upon the amounts which the State and counties shall contribute under section 87-4, toward the payment of the costs for a health benefits plan, as defined in section 87-1(8), and group life insurance benefits, and the parties shall not be bound by the amounts contributed under prior agreements; provided that section 89-11 for the resolution of disputes by way of fact finding or arbitration shall not be available to resolve impasses or disputes relating to the amounts the State and counties shall contribute to the Hawaii public employees health fund. [am L 1986, c 156, § 1; am L 1987, c 27, § 4; am L 1988, c 399, § 4]

(3)

No. 91-796

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NELL A. CAMMACK, *et al.*,
Petitioners,

v.

JOHN WAIHEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENTS UNITED PUBLIC WORKERS, LOCAL 646, AND HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, IN OPPOSITION

MARSHA S. BERZON
(Counsel of Record)
JEFFREY B. DEMAIN
ALTSHULER, BERZON,
NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	2
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562 (1988) 3, 4, 7
Braunfeld v. Brown, 366 U.S. 599 (1961) 10
Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 9
Edwards v. Aguillard, 482 U.S. 578 (1987) 4, 8, 9
Epperson v. Arkansas, 393 U.S. 97 (1968) 6, 9
Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961) 10
Lemon v. Kurtzman, 403 U.S. 602 (1971) 2, 3
Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) 12
McGowan v. Maryland, 366 U.S. 420 (1961) ..... *passim*
Mueller v. Allen, 463 U.S. 388 (1985) 8
School District of Abingdon Township v. Schempp, 374 U.S. 203 (1963) 4, 6, 7
Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) 10
Wallace v. Jaffree, 472 U.S. 38 (1985) 2, 3, 7, 9
Walz v. Tax Commission, 397 U.S. 664 (1970) 3
Zorach v. Clauson, 343 U.S. 306 (1952) 13

STATUTES AND RULES

42 U.S.C. §§ 300z *et seq.* 3
Hawaii Revised Statutes Section 8-1 3
Supreme Court Rule 10.1 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-796

NELL A. CAMMACK, *et al.*,
Petitioners,

v.

JOHN WAIHEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENTS UNITED PUBLIC WORKERS, LOCAL 646, AND HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, IN OPPOSITION

STATEMENT OF THE CASE

Respondents United Public Workers, Local 646, American Federation of State, County and Municipal Employees, and Hawaii Government Employees' Association, Local 152, American Federation of State, County and Municipal Employees (hereinafter "Respondents AFSCME"), adopt the Statement of the Case presented in the Brief in Opposition submitted by the State Respondents.

ARGUMENT

Although the statute in question here is far from unique, the Ninth Circuit opinion in this case is the first and only federal court of appeals or state court of last resort case concerning the question whether giving state employees the day off from work on Good Friday, without more, violates the Establishment Clause. In holding that there is no such violation, the Ninth Circuit enunciated and carefully applied this Court's present Establishment Clause doctrine, as developed in the line of cases beginning with *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Petitioners do not broadly question the *Lemon* doctrine in general,[1] nor do they (or could they) contend that there is a conflict among the circuits or with a state court on the specific issues in this case, necessitating this court's review. *See* Supreme Court Rules Rule 10.1. Rather, petitioners raise only narrow issues concerning the proper application of the *Lemon* doctrine, claiming that those issues are raised by the decision below and are worthy of this Court's plenary review. The Petition's strained attempts to delineate a cert-worthy question, however, misstate the holdings below, seek to involve the Court in an essentially factual dispute concerning the

---

[1] Several members of this Court have suggested that it may be appropriate to develop a *less* restrictive Establishment Clause mode of analysis than the one used in *Lemon* and its progeny. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 108-14 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting). In this case, however, petitioners are, if anything, arguing that the *Lemon* standard should be *tightened* so as to invalidate governmental actions now permitted under this Court's Establishment Clause analytic approach.

Moreover, the question whether to abandon *Lemon* in favor of a less restrictive analytic method would arise in this case only if petitioners could first demonstrate that the court below was wrong in concluding that under the *Lemon* approach as properly applied, Hawaii's choice of holidays did not violate the Establishment Clause. As we show in the text, petitioners have raised no cert-worthy issue in that regard.

purpose of a particular state statute, and ignore controlling precedent of this Court.

1. Under *Lemon*, *supra*, a state statute will survive scrutiny under the Estblishment Clause of the First Amendment as long as it meets three conditions: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13 (citation omitted; quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). Petitioners' principal argument before this Court is that the statute in question, Hawaii Revised Statutes Section 3-1 (hereinafter "the Statute"), lacks a sufficient "secular legislative purpose" and therefore violates the first *Lemon* prong.

Under the "purpose" prong of the *Lemon* test, all that is necessary for the statute to pass Establishment Clause scrutiny is *a* legitimate secular purpose; there is no requirement that the secular purpose be the *only* purpose, or that there be *no* additional religious purposes. As the Court stated in *Wallace v. Jaffree*, *supra*, 472 U.S. at 56, "[A] statute that is motivated in part by a religious purpose may satisfy the first [*Lemon*] criterion." Indeed, "the First Amendment requires that a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion." *Id.* (emphasis added). *See also id.* at 66 (Powell, J., concurring) (same).[2]

---

[2] The Court reaffirmed the *Wallace* formulation in *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562, 2571 (1988), in which it upheld the Adolescent Family Life Act, 42 U.S.C. §§ 300z *et seq.*, against an Establishment Clause challenge. The Court rejected appellees' argument that, although "religious concerns were not the sole motivation behind the Act" and the Act had "a legitimate secular purpose," the Act was unconstitutional because it also had an impermissible religious purpose. *Id.* Rather, the Court concluded:

> The District Court rejected this argument, however, reasoning that even if it is assumed that the AFLA was motivated in part by improper concerns, the parts of the staute to which

The courts below held that the statute has the secular legislative purpose of giving state employees an additional "day off as a rest from their daily affairs" (Pet. App. A93), at a time in the year when there are no other state holidays for several months. Further, the court below enunciated the *specific* secular purpose underlying both the *timing* of the holiday and the choice of the particular day:

> We conclude that the Hawaii statute has a legitimate, sincere secular purpose, specifically to provide Hawaiians with another holiday, and thus is not motivated "wholly by an impermissible purpose." [*Bowen v. Kendrick, supra*, 487 U.S. at 602.] *There is nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons.* That the state legislature was able to accomplish its secular purpose and at the same time *accommodate the widespread religious practices of its citizenry* is hardly a reason to invalidate the statutes. The statute satisfies the purpose prong of the *Lemon* test.

Pet. App. A38 (emphasis added).[3]

---

appellees object were also motivated by other, entirely legitimate secular concerns. We agree with this conclusion.

Id. See also School District of Abington Township v. Schempp, 374 U.S. 203, 296-303 (Brennan, J., concurring).

The dissent below (Pet. App. A51-A53), as well as the dissent from denial of rehearing en banc (Pet. App. A112-A114), took issue with these clear and repeated holdings of this Court and maintained, instead, that to save a state enactment from Establishment Clause invalidity, an otherwise appropriate secular purpose must be "preeminent." Pet. App. A51. Petitioners do not appear to embrace this position, perhaps because it is squarely inconsistent with this Court's cases.

[3] Petitioners do not maintain that the secular purpose of adding a Spring holiday on a day that many state employees would otherwise choose to be absent from work is a "sham" purpose. *See, e.g., Bowen, supra*, 108 S. Ct. at 2571; *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). And indeed, the record fully supports the con-

2. Petitioners first assert that the only secular purpose found below was the general purpose to have *some* other holiday (Pet. at 12), and then maintain that this case merits review because the Court of Appeals embraced the proposition that as long as there is a "broad, general" secular purpose, no examination of "the specific purpose" of the enactment is necessary (*id.* at 9).

Initially, this attempt to manufacture an issue for this court to review fails because, as the quotation above indicates, the courts below *were* quite specific about the secular legislative purpose behind the Statute. Contrary to petitioners' assertion, the courts properly determined that the specific secular purposes for choosing Good Friday *particularly* were: 1) to add an additional state holiday, 2) so that state employees might enjoy a rest from their daily affairs, 3) during a period of the year that had no other state holidays, and 4) on a day that many state employees would otherwise choose to be absent from work. *See* discussion, *supra*, p. 4. Since they fail to acknowledge this identification below of a very specific legislative purpose, petitioners are asking this Court to decide a question not raised by this case at all.

Moreover, the authorities on which petitioners rely for the supposed requirement of hyper-specificity fail to support their legal argument. Those cases relate to

---

clusion of the courts below concerning the reasons Good Friday was chosen as the additional holiday: the legislative history shows that the holiday was added to a period of the calendar which had the fewest state holidays. *See* Pet. App. A91. While the date of Good Friday fluctuates between mid-March and mid-April, the period of its fluctuation is in the middle of a ninety-day period with no other state holidays. *See id.*

Moreover, it is undisputed that "large numbers of Hawaiians observe Good Friday . . . . [and] will take at least part of the day off anyway, in order [to] attend religious services." *Id.* at A40. Thus, the day is a convenient holiday from the state's point of view, since the state's functioning will be in any event impaired on that day due to the absence of many employees.

the issue of whether there was *any* sincere secular legislative purpose (as opposed to a sham purpose), not to whether an existing sincere secular legislative purpose was *specific* enough to satisfy the first *Lemon* criterion.

For example, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), which is relied upon heavily by petitioners (*see* Pet. 10), the Court held that a state law prohibiting the teaching of the theory of evolution in the public schools was not saved from invalidity under the Establishment Clause merely because (as the State Supreme Court had asserted) it was "a valid exercise of the state's power to specify the curriculum in the public schools." *Id.* at 101 n.7. The Court rejected this statement of a secular purpose as a sham, and found that the *only* purpose underlying the statute was "fundamentalist sectarian conviction." *Id.* at 108. As noted above, the secular legislative purpose behind the statute in the present case is clearly not a sham.

Moreover, to the extent that the assertion of the State Supreme Court in *Epperson* constitutes a "purpose" at all, it is not analogous to the secular purpose found by the courts below. An analogous "purpose" here would have been that the Statute was "a valid exercise of the state's power to specify" state holidays. The purpose identified by the courts below, however, went far beyond this platitude and instead specified the secular *reasons* for declaring *that day* a state holiday.[4]

---

[4] Similarly, in *School District of Abingdon Township, supra*, 374 U.S. 203, the Court dismissed as a sham the asserted secular legislative purposes behind a state law requiring that the public school day begin by reading aloud passages from the Bible—to promote moral values, to counterbalance "the materialistic trends of our times," to perpetuate our institutions and to teach literature—and concluded that the only real purpose of the statute was religious. *Id.* at 223. First, the Court relied upon the fact that the case came to the Court on demurrer, so that the assertion in the Complaint that there was no legitimate secular purpose must be deemed to have been admitted. *Id.* at 223-24. Second, the Court

Since the specific secular legislative purpose underlying the Statute is not a sham, the possible existence of other religious purposes (*see* Pet. 11-12) is simply irrelevant. *See Bowen, supra*, 108 S. Ct. 2562; *Wallace, supra*, 472 U.S. 38.[5]

3. Petitioners' second argument asserts that the Court of Appeals mischaracterized the legislative history of the statute by "borrow[ing]" the secular legislative purpose found by the Court to underlay the Sunday closing laws in *McGowan v. Maryland*, 366 U.S. 420 (1961), and "substitut[ing] it for the Hawaii legislature's express, preeminent religious purpose for the 1941 Good Friday holiday law." Pet. 14-15. On this basis, petitioners "ask the Court to decide whether the courts are free to discard legislative intent and substitute their own statement for the legislature's purpose." Pet. 15.

This argument, despite its fancy dressing, amounts to nothing more than the contention that the courts below misread the legislative intent. Even if petitioners were correct in this regard, the question whether or not a court of appeals misunderstood the purpose of the legislature of a single state (actually, here, a territory) in enacting a particular statute does not, standing alone, merit this Court's attention.

Moreover, it is petitioners, not the Court of Appeals, who have misread the legislative history. There is, in fact,

---

held that the statutory exceptions made clear that the asserted secular purposes would not be accomplished by the statute. *Id.* at 224. Finally, the Court noted that the state did not present the Biblical passages in the context of a secular program of education, but rather as a religious exercise. *Id.* at 225. Again, the case did not turn on whether the asserted secular purposes were too general, but rather whether they were a sham.

[5] Moreover, for the reasons set forth by the State Respondents, we submit that petitioners have misread the legislative history to create a religious purpose behind the Statute. *See* State Resp. Br. 6-9.

nothing in the legislative history of the 1941 Statute that suggests a religious purpose. *See* Pet. App. A32. To divine a religious purpose, petitioners are relegated instead to the legislative histories of the bills *preceding* the 1941 Statute, which were not enacted into law. While the earlier bills may be relevant to the purpose inquiry (*see Edwards, supra*, 482 U.S. at 594), they are certainly not determinative.

In any event, the secular legislative purpose of the Statute is clear from the face of the law and the legislative history of the 1939 bill. The legislature desired to add another Spring holiday, and was faced with a situation in which many employees were taking personal leave from work to attend church services on Good Friday.[6] Even if that purpose were not expressed in the legislative history, however, the Court of Appeals would have been justified in discerning it from the Statute and its history. As the Court held in *Mueller v. Allen*, 463 U.S. 388, 395 n.4 (1985), the fact that a statute "contains no express statements of legislative purposes, and its legislative history offers few unambiguous indications of actual intent. . . . does not affect [the Court's] treatment of the statute [under the purpose prong of the *Lemon* test]." Rather, the Court is "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular pur-

---

[6] *See* Pet. App. A33 (1939 Committee Report specifies that an increasing number of churches were holding lengthy services on Good Friday, and an increasing number of private employers were giving their employees time off to attend such services). It is no answer to assert that no accommodation to the wishes of state employees was necessary because they could already use their personal vacation time in order to take the day off. *See* Pet. 13 n.20. The state holiday is clearly a preferable accommodation to the large number of employees who otherwise would be obliged to use up their personal vacation time for this purpose. And because the state's operation is necessarily impaired on a day when a large number of employees are absent, closing governmental operations on that day rather than on one on which full operation would otherwise be possible makes sense from an administrative point of view.

pose for the State's program may be discerned from the face of the statute." *Id.* at 394-95.[7]

Indeed, in Establishment Clause cases, the Court will defer to the lower federal courts' "rational construction" of the purpose of a state statute, because district and circuit courts are " 'better schooled in and more able to interpret the laws of their respective States.' " *Edwards, supra*, 482 U.S. at 609 (White, J., concurring) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985)). Because the Court of Appeals' construction of the secular legislative purpose of the Statute is, at worst, rational, this Court's review would, under established doctrine, result simply in reaffirming that construction. For this reason as well, petitioners have not presented a certworthy issue.

4. Petitioners' final argument asserts that merely by scheduling a state holiday to coincide with a religious holiday, the state, without more, "endorses" religion in violation of the Establishment Clause. *See* Pet. 15-18. In making their argument, petitioners seize upon a purported distinction between Good Friday and Christmas, characterizing the latter but not the former as a secularized religious holiday. Regardless of the correctness of this distinction,[8] Petitioners have entirely failed to address the most pertinent analogy to the Statute—the Sunday closing cases.

---

[7] *Accord Wallace, supra*, 472 U.S. at 75 (O'Connor, J., concurring) ("Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence' " (quoting *Epperson, supra*, 393 U.S. at 108)).

[8] Since the Court of Appeals agreed with petitioners on this point (*see* Pet. App. A49 n.19), the questions whether or not Good Friday is a secularized holiday and what standards should be applied in making that determination are not presented by the Petition in this case.

In *McGowan v. Maryland*, 366 U.S. 420 (1961), *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), and *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Court upheld against Establishment Clause challenges state laws requiring certain businesses to be closed on Sundays. The Court expressly acknowledged that, as a historical matter, both Sunday closing laws in general and the particular statutes in question were strictly religious in origin, i.e., to mandate the observance of the Christian sabbath. *See McGowan, supra*, 366 U.S. at 431-33, 445-47; *Gallagher, supra*, 366 U.S. at 625; *Two Guys, supra*, 366 U.S. at 592-94. The Court upheld the Sunday closing laws notwithstanding their religious origins, however, because it recognized that over time the laws had acquired additional secular aspects and therefore "neither the statute[s'] purpose nor [their] effect is religious." *Two Guys, supra*, 366 U.S. at 598.

Specifically, the Court noted that both the federal and state governments had become increasingly concerned with "the improvement of the health, safety, recreation and general well-being of our citizens" (*McGowan, supra*, 366 U.S. at 444), and that to secure such improvement they have enacted "[n]umerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds" (*id.* at 444-45). The Court then examined the Sunday closing laws within this secular context:

> Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its sec-

> ular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

Id. at 445. The Court continued by noting the many secular functons that a day of rest on Sunday has come to serve in our society:

> Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. "Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer. * * *" 308 Parliamentary Debates, Common 2159. Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord.

Id. at 451-52 (footnote omitted).

The present case is even less problematic than the Sunday closing cases. Here, the religious origin of the Statute is less clear and, unlike the Sunday closing cases, there was a legitimate secular purpose *ab initio*. Indeed, there is no record evidence that the collective bargaining agreements, which now mandate the observance of the holiday as much as does the Statute, were motivated in any degree by religious considerations. Moreover, the impact of the Statute is much less intrusive than the Sunday closing laws because the Statute does not regulate how private parties must operate their businesses.

In other aspects, the Statute is strikingly similar to the Sunday closing laws. Like the Sunday closing laws, the Statute seeks to provide a day of respite from work during which state employees can pursue a variety of recreational or devotional activities of their own choosing, and the record evidence demonstrates that good advantage is in fact taken of this opportunity to pursue secular activities.[9] Moreover, the secular nature of the Statute is evidenced by the fact that its "proponents" are not "exclusively representatives of religious interests." *McGowan, supra*, 366 U.S. at 435. Rather, "labor groups" such as Respondents AFSCME vigorously support the Statute as providing a needed respite from work on a day convenient for that purpose. *See id.* Finally, like the Sunday closing laws, the Statute does not in any way mandate or even encourage any sectarian or devotional activity on the holiday; as noted above, state employees are free to pursue any activities they desire.[10] In all, state employees of all religions, as well as those with no religion, have come over the years to regard Good Friday as a day off from work to pursue personal activities.

For the foregoing reasons, this case is on all fours with the Sunday closing cases. As the Court of Appeals concluded, by scheduling a state holiday to coincide with a day that a great number of state employees would otherwise be absent from work, the Statute merely ac-

---

[9] *See, e.g.*, Declaration of Robert B. Robinson, October 17, 1987, C.R. 61 (shopping); Declaration of Lex Brodie, October 14, 1987, C.R. 63 (servicing automobiles); Deposition of Genie Lucas at 25 (shopping); Deposition of Douglas Root at 85-86 (shopping); Declaration of Richard Kanayama, C.R. 47 (outdoor activities in state parks); Letter from Hiram Kamaka to Richard Wurdeman, July 9, 1987, C.R. 23 (outdoor activities in city parks).

[10] *Cf. Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) (state law mandating that state government offices close for three hours on Good Friday violates the Establishment Clause because the timing of the release encourages employees to attend religious services).

knowledges religion, but does not "endorse" it in violation of the Establishment Clause. As this Court has concluded, "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets or some or all religions." *McGowan, supra*, 366 U.S. at 442. To the contrary,

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

Because the Statute merely adjusts the schedule of the State's public holidays to acknowledge the religious practices of a large number of its employees, it does not endorse religion in violation of the Establishment Clause, and review by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARSHA S. BERZON
(Counsel of Record)
JEFFREY B. DEMAIN
ALTSHULER, BERZON,
NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151

January 17, 1992

DISTRIBUTED
JUN 25 1992

No. 91-796

Supreme Court, U.S.
FILED
JUN 24 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, *et al.*,

Petitioners,

vs.

JOHN WAIHEE, *Governor of Hawaii, et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

GOVERNMENT RESPONDENTS' SUPPLEMENTAL MEMORANDUM

RONALD B. MUN*
Corporation Counsel
City and County of Honolulu
KARL K. ICHIDA
Deputy Corporation Counsel
City and County of Honolulu
Honolulu Hale
Honolulu, Hawaii 96813
(808) 523-4832
Counsel for Respondents Mayor, Managing Director and Director of Civil Service, City and County of Honolulu ("City and County Respondents")

*Counsel of Record for City and County Respondents

WARREN PRICE, III
Attorney General
State of Hawaii
STEVEN S. MICHAELS**
Deputy Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Counsel for Respondents Governor of Hawaii and Director of Personnel Services, State of Hawaii ("State of Hawaii Respondents")

**Counsel of Record for State of Hawaii Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 91-796

In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, *et al.*,

Petitioners,

vs.

JOHN WAIHEE, *Governor of Hawaii, et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

GOVERNMENT RESPONDENTS' SUPPLEMENTAL MEMORANDUM

SUPPLEMENTAL ARGUMENT

This case has been held for conference, apparently pending the disposition of *Lee v. Weisman*, No. 90-1014 (U.S. June 24, 1992). As stated by the Court in its opinion handed down today:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance

> and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Lee v. Weisman, 1992 Westlaw 138525, 13825*6 (U.S. June 24, 1992). In our case, No. 91-796, involving Hawaii's practice of adjourning most public business on good Friday (private persons and businesses are as free to remain open or conduct their private affairs subject to others' closures as on any other day), none of the factors which warranted this Court's conclusion that the Establishment Clause was violated are present. *See* Gov't Resp. Br. in Opp. at 4-14. Indeed, none of the grounds for denial of the writ, as expressed by both opposition briefs in this case, are at all diminished by the ruling in *Lee v. Weisman*. Indeed, *Weisman*, simply stated, involves nothing more than "settled rules pertaining to prayer exercises for students." 1992 Westlaw 138525*6. This case is therefore unaffected by *Weisman*.

The Ninth Circuit, as Respondents have pointed out, applied the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and did so correctly. *Lee v. Weisman* does not counsel further review. Indeed, it does not counsel even a remand to the Ninth Circuit for further reconsideration. Such remands are generally ordered by this Court only when the intervening precedent is "sufficiently analogous and, perhaps, decisive, to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964)

(per curiam). The decision of this Court in *Weisman* does not counsel remand under this test.

CONCLUSION

For the foregoing reasons and all those previously stated by Respondents, the petition in No. 91-796 should be denied.

Dated: Honolulu, Hawaii, June 24, 1992

RONALD B. MUN*
Corporation Counsel
City and County of Honolulu
KARL K. ICHIDA
Deputy Corporation Counsel
City and County of Honolulu
Honolulu Hale
Honolulu, Hawaii 96813
(808) 523-4832
Counsel for Respondents
Mayor, Managing Director and Director of Civil Service, City and County of Honolulu ("City and County Respondents")

*Counsel of Record for City and County Respondents

WARREN PRICE, III
Attorney General
State of Hawaii
STEVEN S. MICHAELS**
Deputy Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Counsel for Respondents
Governor of Hawaii and Director of Personnel Services, State of Hawaii ("State of Hawaii Respondents")

**Counsel of Record for State of Hawaii Respondents